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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

MODERN GRAPHIC ARTS, INC.,
a Florida Corporation,
and
TIMES PUBLISHING COMPANY, A Florida Corporation
d/b/a ST. PETERSBURG TIMES,

Petitioners,

vs.

WILLIAM C. BEDINGHAUS, ROBERT D. BACON,
BARBARA J. ORR, Individually
and as Class Representatives,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Employer Modern Graphic Arts, Inc. (hereinafter "MGA") was a printing enterprise with 100% of its stock owned by Times Publishing Company (hereinafter "Times"). MGA provided its employees with various employee benefits including severance benefits that became due if the employee was "discharged" from employment. In 1989, the Times sold 100% of the MGA assets to a successor owner who continued to operate the business and continued to employ the entire MGA staff. Respondents Bedinghaus, Bacon and Orr (hereinafter "Plaintiffs") were MGA employees who worked for MGA before and after the sale. They claimed that the Times and/or MGA owed them severance benefits because, by virtue of the asset sale, and despite uninterrupted, unchanged jobs, the employees characterized themselves as "discharged". The administrators of the Times and MGA severance plans denied entitlement on the grounds that there had been no "discharge" or "termination" as those terms are used in the plans, because the employees continued to be employed in the same job with the same duties and responsibilities, compensation and comparable benefits without interruption.[1] The only substantive

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[1] The Times denied any entitlement on the grounds that MGA employees were never employed by or participants in the Times plan and, even if they had qualified as employees, there was no severance entitlement because there had been no "discharge" or "termination" as such terms are used in the Times severance plan.

QUESTIONS PRESENTED – Continued

change was the identity of the owner and such did not trigger severance benefit entitlement.

Plaintiffs sued individually and as representatives of the class of all MGA employees, claiming wrongful denial of severance benefits governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). On cross-motions for summary judgment, the district court held that the Plaintiffs were not entitled to benefits because there had been no "discharge" or "termination" under the terms of the plans.

On appeal, the Eleventh Circuit reversed the district court, holding that severance benefits were due despite the fact that each employee continued to be employed with the successor owner without interruption.

This Petition presents the following questions:

1. Is the circuit court's holding, that severance pay is due merely upon a change of corporate ownership where employment continues without interruption or any substantive change, in conflict with other circuit courts which have considered essentially identical issues?

2. Did the circuit court err in holding that severance benefits are due where employment continues without interruption and the only significant event involves a change in the ownership of the employer?

3. Does the split in decision between circuits concerning entitlement to severance pay where employer

QUESTIONS PRESENTED – Continued

ownership changes but jobs remain the same, create conflicts in ERISA rights and remedies, based on nothing more than geographical location?

4. Do the terms "terminate" and "discharge" from employment, as applied to continuing employment during a change in employer ownership with no job loss or interruption, present an ambiguity which, under the Supreme Court's directive in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), requires the court to consider evidence of the employer's intent in creating the plan, and the past practice of the employer in administering the benefit?

THE PARTIES AND RULE 29.1 LIST

The individually named parties to the proceeding below appear in the case caption. Pursuant to Supreme Court Rules 14.1(b) and 29.1, Petitioners Modern Graphic Arts, Inc. and the Times Publishing Company list the following entities as related companies or subsidiaries:

MGA Holdings, Inc.
Modern Graphic Arts, Inc.
The Times Publishing Company

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rules 10 through 14, MODERN GRAPHIC ARTS, INC., and TIMES PUBLISHING COMPANY ("MGA" and the "Times"; collectively "the Petitioners") respectfully petition that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit in

Bedinghaus v. Modern Graphic Arts, 15 F.3d 1027 (11th Cir. 1994).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported officially as *Bedinghaus v. Modern Graphic Arts*, 15 F.3d 1027 (11th Cir. 1994), and is reprinted in the Appendix ("App. 1"). The Eleventh Circuit's unreported decision denying Petitioners' petition for rehearing, issued on April 28, 1994, is reprinted in the Appendix ("App. 17"). The opinion of the district court for the Middle District of Florida entering summary judgment for Petitioners on Plaintiffs' ERISA severance benefit claim, published at 782 F. Supp. 604 (M.D. Fla. 1992), is reprinted in the Appendix ("App. 19").

JURISDICTION

i. The court of appeals below had jurisdiction of this case under 28 U.S.C. § 1291 and entered its judgment on March 9, 1994.

ii. On April 28, 1994, the circuit court denied Petitioners' petition for rehearing.

iii. Non-applicable.

iv. This Court's jurisdiction to review the judgment in question is based on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act, Section 3(1)(A), 29 U.S.C. § 1002(1)(A) provides:

> **Definitions**
>
> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . .

Employee Retirement Income Security Act, Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), provides in pertinent part:

> **Fiduciary Duties**
>
> Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Employee Retirement Income Security Act, Section 502(a)(1), 29 U.S.C. § 1132(a)(1):

Civil Enforcement

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

A. Identity Of The Parties.

Modern Graphic Arts, Inc. ("MGA") is a printing business operating in the Tampa Bay area of Florida for many years. The Times Publishing Company (the "Times") is primarily engaged in the newspaper business and is publisher of the St. Petersburg Times. In 1977, the Times purchased 100% of the stock of MGA. In 1989, the Times sold all MGA assets to a new owner, MGA Holdings, Inc.

The Plaintiff class is comprised of individuals who worked at MGA before and after the 1989 sale. After the sale, the Plaintiffs continued to be employed without interruption in the same jobs, with the same duties, the same compensation, the same top management, and a

comparable benefit package.[2] Plaintiffs claim that as a result of the change in ownership and despite continued employment, they are entitled to severance benefits.

B. Terms Of The Severance Policy.

The terms of the severance policy are set forth in the Times' employee handbook, the "Times-O-Guide". That policy, under the heading "Termination", provides severance benefits only in the event the employee is "discharged as a full-time staffer".

The handbook uses the word "discharge" only in terms of loss of the job; dismissal from the work force.

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[2] The fact of record is that the overall level of benefits provided to Plaintiffs after the sale is virtually identical to that received by Plaintiffs before the sale; the value of Plaintiffs' total benefit package did not diminish as a result of the asset sale. The circuit court, in reversing summary judgment for Petitioners, stated that it was influenced by the fact that the successor ownership did not provide employees with the same severance benefits. (App. 9). The record fact is that a benefit package of *comparable value*, though not identical benefits, was provided.

Moreover, Petitioners believe that it was error for the circuit court to rule that Plaintiffs are entitled to severance benefits from the Times/MGA program, based on what might or might not have been available under successor programs. The Times/MGA plan does not, in any manner, hinge severance entitlement on whether the employee maintains the same benefits throughout his or her working life. The Times/MGA policy provides for benefits only in the event of a "discharge" from employment. The circuit court compounded this error by relying on this extrinsic evidence to interpret the plan, while terming plan language "unambiguous" and ignoring Petitioners' uncontroverted extrinsic evidence of past practice.

For instance, the employee is informed that a final paycheck, pay for unused vacation, relinquishment of office keys, and return of company uniforms all accompany a "discharge". *Id.* When MGA was sold, none of these indicia of "discharge" ever applied to any of these employees. Plaintiffs continued in the same job, at the same office, with the same customers and management, for the same rates of pay. The company ownership changed, but MGA jobs remained intact and unchanged. *Id.*

1. The Meaning Of The Term "Discharge" In The Context Of The Times-O-Guide Policy And As Understood By Plaintiffs.

The Times-O-Guide is written in a conversational style, using common parlance. The Times-O-Guide uses the term "discharge" to describe a dismissal from the workplace; loss of a job. Neither the Times-O-Guide nor the MGA Staffer Handbook[3] contain any promise of a continuing relationship within the Times organization. There is no statement that severance will be paid if MGA is not continued to be owned by the Times. There is no suggestion that severance benefits will be paid where jobs continue in the course of corporate restructure.[4]

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[3] MGA's "Staffer Handbook" served as a supplement to the Times-O-Guide. To the extent there is any conflict between language of the MGA Staffer Handbook and the Times-O-Guide, the Times-O-Guide prevails.

[4] In fact, as originally drafted, the Times policy contained a reference that job loss due to "change in company operations" would trigger severance benefit rights. In 1970, management

"Discharge" from employment is the prerequisite to severance entitlement.

Plaintiffs conceded in depositions that the term "discharge" describes the situation in which the employee is no longer on the job; no longer performing duties in the workplace. According to each of the Plaintiffs, the term "discharge" did not accurately describe their employment situation at MGA. The Eleventh Circuit failed to consider the Plaintiffs' own testimony as to their understanding of "discharge" in reaching the conclusion that Plaintiffs were "discharged as full-time staffer[s]".

During the half-century history of the Times' severance policy, the "discharge" prerequisite was satisfied, and the Times' severance benefits were triggered, only where a job was lost. Severance benefits were never intended and were not provided where the employee remained on the job.[5] The Eleventh Circuit never

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amended the policy and eliminated that clause. The purpose of the amendment was to make clear that actual job loss was the condition precedent to entitlement; a corporate restructure with no job loss would not trigger benefits. The Eleventh Circuit failed to consider this compelling statement of the parties' intent.

[5] The trial court correctly observed that, in common parlance, "discharge" in the context of the Times' severance plan described job loss; the trial court correctly noted that, in the ordinary course of human events, job loss creates at least a momentary period of unemployment, and the risk of longer term unemployment. This concept is in keeping with the definition of "employee welfare benefit plan" under ERISA Section 3(1)(A), 29 U.S.C. § 1002(1)(A), as well as the general definition and common usage of the term "discharge" in the context of severance. The Eleventh Circuit misconstrued this concept

addressed the undisputed evidence establishing this half-century of consistent interpretation and application of the severance policy.

2. After The Sale, Plaintiffs' Jobs Continue Without Interruption.

On May 13, 1989, the sale of MGA assets closed and MGA Holdings, Inc. became the new owner. With the exception of two MGA employees who lost their jobs and were paid severance benefits, the work force remained intact. Jobs and duties were entirely unchanged. Compensation was unchanged. Executive management was unchanged. The overall value of the employee benefit package was unchanged. Despite continued employment under new ownership, the Plaintiffs brought suit for severance benefits.

C. Findings Of The District Court; The Term "Discharge" Is Not Satisfied By A Mere Ownership Change.

On the parties' cross-motions for summary judgment, the district court found that "discharge" in the ERISA severance pay context means actual job loss; where jobs remain intact and unchanged, mere change in employer

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when it wrongly interpreted the district court's holding as imposing unemployment as a condition precedent to severance entitlement. In fact, during a two-month period after the sale, any MGA employee who was discharged from the job was eligible for severance. There was no requirement of any period of "unemployment"; the only question was discharge from the position held at MGA.

ownership does not suffice. App. 27-29. The MGA employees did not suffer "discharge" with the attendant unemployment (even if momentary) that such term connotes. *Id.* The district court held there was no ERISA right to severance because "discharge" as that term was used in the Times' policy had never occurred. Summary judgment was granted for the Petitioners. Plaintiffs' cross-motion claiming benefit entitlement as a matter of law, was denied.

Because the trial court viewed the plan terms to clearly and unambiguously require actual job loss, it did not address the Petitioners' uncontroverted evidence establishing management's intent, and its implementation of the severance policy over the fifty year history of the Times' plan.

D. The Eleventh Circuit's Reversal.

On appeal, the Eleventh Circuit reversed the ruling of the district court, and held that the Plaintiffs were entitled to severance pay when the Times sold MGA in 1989.

Despite continued MGA employment, with identical duties, pay and workplace, the Eleventh Circuit held that Plaintiffs were "discharged" in connection with the ownership change. In order to reach this result, the Eleventh Circuit made the finding (with no evidence presented by either party) that "staffer" is a term unique to the Times, and that the severance plan's reference to "discharge as a full-time staffer" constitutes a clear and unambiguous promise that severance will be paid if the employee's relationship *with the Times* came to an end. In fact, there was no evidence whatsoever that "staffer" is a term

unique to the Times, or that the term is anything more than a conversational synonym for "employee", a term commonly used in the newspaper, advertising and print industries.

In fact, the term "staffer" is defined and commonly understood as a synonym for employee.[6] The record contains no evidence to support the Eleventh Circuit's holding that, after the change in MGA ownership, the MGA staff was "discharged as full-time staffers". There is no evidence that the term "staffer" ceased to be used at MGA as of the date of the asset sale.

The circuit court's holding is premised on the view that the phrase "discharged as a full-time staffer" has a "natural meaning" which renders it unambiguous (despite the record fact that such "meaning" is directly contrary to the employer's uncontested proof of intent in creating and implementing the severance plan over a fifty year period). The court did not provide any source or authority for the "natural meaning" which it ascribed to the plan language. Petitioners believe the plain meaning of the terms "discharge" and/or "terminate" in the severance context, combined with Plaintiffs' admissions that they were never "discharged" from MGA, compel the conclusion that mere change in ownership does not constitute a "discharge" from the job as the term is used in the severance plan.[7]

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[6] For example, *Webster's Ninth New Collegiate Dictionary* (1987), defines "staffer" as "a member of a staff (as of a newspaper)".

[7] In fact, the parties stipulated that each party had a different interpretation of the phrase "discharged as a full-time

In the district court and on appeal, Petitioners argued, alternatively, that if there was any ambiguity in the meaning of "discharged as a full-time staffer" as applied to the instant change in ownership situation, the evidence of intent and past practice must be considered. Petitioners relied on undisputed proof spanning a half century of business practice establishing that Times management intended to provide, and in fact provided, severance benefits if and only if a job was actually lost. The record details past administration of the severance policy under circumstances essentially identical to the present facts.[8] In each such instances, where the jobs continued uninterrupted, employees and management shared the understanding that there was no "discharge" as the term is used in the Times' severance policy. Where ownership changed but the job continued uninterrupted, no severance benefit was due.

The Eleventh Circuit did not consider the uncontroverted evidence of the employer's intent and consistent practice in creating and providing the severance benefit only where a job is lost. Rather, the Court

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staffer" and that their interpretations of the policy language were "different and, on crucial points, diametrically opposed." App. 31, 35. This stipulation should have, at a minimum, rendered the phrase ambiguous. The Eleventh Circuit did not address this stipulation.

[8] Facts documenting the creation and implementation of severance benefits, in place at the Times since the 1940's, are set forth in the uncontroverted Affidavits of Clifton Camp, John Olson, Norman Dusseault, and others. These Affidavits, although a part of the record below, were never addressed by the Eleventh Circuit.

accepted the Plaintiffs' specialized definitions of "discharge" and "staffer" to require payment of severance benefit based on nothing more than an ownership change, and despite the fact that all jobs continued. The circuit court deferred to Plaintiffs' arguments, and concluded that the plan promised severance benefits in the event of any ownership change. The record fact is that no such promise is contained in any part of this plan; there is certainly no "clear" or "unambiguous" promise of any such benefit.

As a result of the instant decision, which confirms previous Eleventh Circuit precedent, employees subject to the Eleventh Circuit's jurisdiction enjoy ERISA severance benefit entitlements that have been flatly rejected in several other circuits throughout the United States. For employers and employees within the Eleventh, Third and Ninth Circuits, a change in corporate identity, structure or ownership is sufficient to trigger entitlement to severance benefits despite the fact that jobs continue essentially unchanged. Within these circuits, a "discharge" requirement is satisfied by nothing more than an ownership change. The Second, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits have considered substantially identical issues and circumstances and have concluded that no severance benefit is due. In these jurisdictions, a severance plan requirement of "discharge" or "termination" is not satisfied by a mere corporate sale or restructure where the job remains intact and ongoing.

The result of this conflict is a patchwork of ERISA severance rights and remedies which are dependent solely upon the geographical location of the parties. Such conflict is directly contrary to Congress' and this Court's

objective of uniform ERISA standards and practices on a nationwide basis. The review of this Court is required to resolve this significant conflict in ERISA governed rights and obligations.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit misinterpreted plan language and ignored employer intent. The Eleventh Circuit created enforceable rights to severance benefits where no jobs were lost. The court inferred an ERISA promise to continued employment under the same corporate ownership despite the fact that no such promise was ever made. As a result of this interpretation, employees within the jurisdiction of the Eleventh Circuit enjoy entitlement to severance benefits when they remain in the same job during a change in the identity or structure of the employer. In other circuits, under essentially identical circumstances, the employees' claimed right to severance pay has been denied. This conflict within the circuits creates a significant variance in ERISA-governed benefit rights, solely dependent upon the circuit in which the claimed entitlement is decided.

The decision of the court of appeals below conflicts in principle with this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), which recognizes that ERISA plan terms must be given their plain meaning and that, in the event of an ambiguity in plan terms, the intent of the employer and historical practices of benefit administration must be taken into account.

I. THERE IS A SIGNIFICANT, IRRECONCILABLE CIRCUIT SPLIT ON THIS ERISA EMPLOYEE BENEFITS ISSUE, WHICH THWARTS CONGRESSIONAL INTENT FOR A UNIFORM APPLICATION OF ERISA.

The Eleventh Circuit's holding underscores the split of authority among the circuits on the important question of whether a corporate sale without job loss constitutes a discharge from employment so as to trigger ERISA severance benefits. The differing decisions of the circuits cannot be reconciled without this Court's guidance.

The intent of ERISA, as stressed by this Court, was to provide a uniform scheme of employee benefit laws and eliminate the "patchwork" administration of benefits from state to state. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10, 107 S.Ct. 2211, 96 L.Ed.2d 1, 10 (1987). Where severance benefits are claimed upon a mere corporate sale, the expressed will of Congress and this Court is negated. A "patchwork" of severance benefits entitlement now exists on a circuit-by-circuit basis.

Under the current state of the law, severance benefit entitlement depends on the happenstance of the location of the business. The same severance benefit plan would be subject to one set of entitlement criteria in Atlanta or Philadelphia, and entirely different criteria in New York, Baltimore, Cleveland, Chicago, St. Louis, or Denver.

The Supreme Court's review is necessary to resolve the split of authority among the circuits, to promote the intent expressed by Congress and confirmed by this Court that ERISA provide uniform rights and remedies, consistently administered throughout the United States.

This is an important issue which is recurring throughout the country; the circuit split will not be resolved without this Court's intervention.

A. The Eleventh Circuit's Position Is Contrary To The Second, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits.

In reversing the trial court's ruling and finding severance entitlement without job loss, the Eleventh Circuit relied on two prior Eleventh Circuit cases which reached the same result, *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985), and *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987). *See Bedinghaus v. Modern Graphic Arts*, 15 F.3d 1027 (11th Cir. 1994) (App. 1).

In the Eleventh Circuit, a corporate sale with no job loss, and no job interruption, constitutes a "discharge" as a matter of law, fully sufficient to trigger severance benefit rights.[9] Here the record established, uncontrovertedly,

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[9] The Eleventh Circuit view is shared, at least to some degree, by the Third and Ninth Circuits. *Ulmer v. Harsco Corp.*, 884 F.2d 98 (3d Cir. 1989); *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985). These circuits are in direct conflict with the Second, Fourth, Sixth, Seventh, Eighth and Tenth Circuits. To add to the conflict, the First Circuit is internally divided on the issue. *Compare Bellino v. Schlumberger Tech., Inc.*, 944 F.2d 26 (1st Cir. 1991) (entitlement) *with Allen v. Adage*, 967 F.2d 695, 701 (1st Cir. 1992) (no entitlement); *see Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277 (10th Cir. 1994) (White, Associate Justice (Ret.)) (vitality of *Bellino* in question after First Circuit decided *Allen*).

that the Times made continued employment of the MGA workforce a priority in selecting a buyer for its MGA assets. In the Eleventh Circuit, the employer's care in maintaining jobs, job duties, and compensation, results in employer liability for severance benefits. In the Eleventh Circuit, it is true that "no good deed goes unpunished". Congress surely never intended such an anomalous result.

The Eleventh Circuit's position that a corporate sale or change in ownership constitutes an actual "termination" or "discharge" for purposes of severance benefit entitlement, is directly contrary to established law in several other circuits. The Second,[10] Fourth,[11] Sixth,[12] Seventh,[13] Eighth,[14] and Tenth[15] Circuits have all held

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[10] *Bradwell v. GAF Corp.*, 954 F.2d 798 (2d Cir. 1992); *Schwartz v. Newsweek, Inc.*, 827 F.2d 879 (2d Cir. 1987); *Accardi v. Control Data Corp.*, 836 F.2d 126 (2d Cir. 1987).

[11] *Fuller v. FMC Corp.*, 4 F.3d 255 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1062 (1994); *Sejman v. Warner-Lambert Co., Inc.*, 889 F.2d 1346 (4th Cir. 1989), *cert. denied*, 498 U.S. 810 (1990); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).

[12] *Rowe v. Allied Chemical Hourly Employees Pension Plan*, 915 F.2d 266 (6th Cir. 1990); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623 (6th Cir. 1987).

[13] *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983).

[14] *Schroeder v. Phillips Petroleum Co.*, 17 F.3d 1147 (8th Cir. Mar. 10, 1994); *Harper v. R.H. Macy & Co., Inc.*, 920 F.2d 544 (8th Cir. 1990); *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541 (8th Cir. 1989).

[15] *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272 (10th Cir. 1994) (White, Associate Justice (Ret.)).

that actual job status, as opposed to employer identity, is the proper ERISA severance benefit entitlement test.

The Fourth Circuit, for example, has repeatedly held that actual employment status, as opposed to employer identity, is the proper entitlement test. *See Fuller v. FMC Corp.*, 4 F.3d 255 (4th Cir. 1993); *Sejman v. Warner-Lambert Co., Inc.*, 889 F.2d 1346 (4th Cir. 1989), *cert. denied*, 498 U.S. 810 (1990). In these cases, employers sold a plant (*Fuller*) and one of its divisions (*Sejman*); in both cases, jobs continued without interruption under new ownership. In both cases, the employees claimed that the sales technically constituted "job terminations" thereby triggering severance benefit rights. In both cases, the Fourth Circuit refused the employees' interpretation of the severance package plans. A mere change in employer ownership or structure with no actual loss of the job, would *not* trigger severance entitlement. Working employees had no right to collect a severance pay check. *Fuller*, 4 F.3d at 259; *Sejman*, 889 F.2d at 1349-50.

In refusing to construe an ownership change as actual discharge from the job, the Fourth Circuit cautioned:

> Courts should hesitate to impose upon companies unwritten contractual liabilities. Payment of severance benefits here would constitute a significant, unforeseen and costly liability . . . . Supplementing (plaintiffs') salary checks from PMP with severance payments from Warner-Lambert would seem even more of a windfall, . . . *it would award severance pay to persons who never changed their jobs and were never out of work.*

Sejman, 889 F.2d at 1350 (emphasis added).

The Fourth Circuit's common-sense approach is followed in other circuits. The Eighth Circuit in *Harper v. R.H. Macy & Co., Inc.*, 920 F.2d 544 (8th Cir. 1990) considered facts essentially identical to the instant claim. The *Harper* severance benefit claim arose out of Macy's sale of its St. Louis stores to another chain. Retail jobs under new ownership remained fully intact. The employees claimed that Macy's was obliged to pay them severance because, technically speaking, the sale resulted in "permanent termination" of their Macy's employment. The trial court entered summary judgment for the employer. On *de novo* review, the Eighth Circuit confirmed that termination in the ERISA severance pay context meant termination of *actual* employment; mere change in employer identity would not suffice:

> Without deferring to either party's interpretation . . . Macy's [sale of the stores] did not permanently terminate the employees within the meaning of the plan. The plan's language does not permit an interpretation that employees who continue to work without interruption on comparable terms for the purchaser of their employer's business have been "permanently terminated" by the sale.

Harper v. R.H. Macy & Co., Inc., 920 F.2d at 544 (8th Cir. 1990). *See also Schroeder v. Phillips Petroleum Co.*, 17 F.3d 1147 (8th Cir. 1994) (sale did not constitute a "layoff" or "reduction in force" of employees who kept jobs with successor); *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541 (8th Cir. 1989) (employer changes with continued employment is not a "termination").

The Second Circuit takes the same view of severance benefits; such benefits are not triggered where no job is lost:

> [I]n the context of the sale of a business where the buyer retains the former owner's employees, it would give a windfall to award severance pay to employees who never changed their jobs and were never out of work.

Bradwell v. GAF Corp., 954 F.2d 798, 801 (2d Cir. 1992); *See Reichelt v. Emhart Corp.*, 921 F.2d 425, 480 (2d Cir. 1990), *cert. denied*, 501 U.S. 1231 (1991).

Retired Associate Justice White, sitting by designation on the Tenth Circuit Court of Appeals, recently refused ERISA severance benefits to employees on such a transfer of corporate control:

> Allowing appellants severance pay in these circumstances would not only turn the plain meaning of the [plan's] provision on its head, but, as the District Court discussed, it would do the same to the primary intention behind the provision of severance pay. Several circuit courts, as with the District Court here, have noted that *severance pay is largely afforded to help former employees minimize the privations of temporary unemployment while they seek new work.* [citations omitted]. Reading the [plan's] provision as mandating payment when a transfer of control has taken place and the employee has retained his same position without interruption would in no way advance this interest; indeed, rather than softening the blow of a period of unemployment, it would only serve to provide appellants a happy period of double income.

Headrick v. Rockwell Int'l Corp., 24 F.3d 1272, 1276-77 (10th Cir. 1994) (White, Associate Justice (Ret.)) (emphasis added, citations omitted).

The Sixth and Seventh Circuits have also refused to "award [plaintiffs] a happy period of double income" in such circumstances, *Headrick*, 24 F.3d at 1277; where employment continues in a change of corporate control, no severance benefit is due. *Rowe v. Allied Chemical Hourly Employees Pension Plan*, 915 F.2d 266 (6th Cir. 1990); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623 (6th Cir. 1987); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983).

The Eleventh Circuit is entirely at odds with these sister circuits' interpretation of ERISA severance entitlement. The Eleventh Circuit, as well as the Third and Ninth Circuits, eschew the common-sense and plain meaning approach, inferring a legalistic construction of "termination" that other circuits have considered and rejected. The Eleventh Circuit, conspicuously contrary to the other above-cited circuits, has repeatedly held that "discharge" or "termination" conditions precedent to severance entitlement must be interpreted to mean "changes in corporate ownership" or "sale of assets". The Eleventh Circuit has created severance benefit rights, within its geographic jurisdiction, that are very different from ERISA benefit rights elsewhere in the country.

The Eleventh Circuit approves what other circuits have rejected as "windfall" severance benefits for employees whose jobs were never lost. In the instant case, the Eleventh Circuit sought to avoid the windfall nature of severance benefits paid along with regular paychecks. The court observed that if the successor corporation does

not provide the benefit and does not credit years of prior service, then the employee has "lost" a severance benefit "right". App. 9. This philosophy creates another layer of conflict with other circuits, and contradicts the plain meaning of severance benefits under ERISA. Severance benefits are not vested; they are contingent and unaccrued. "[E]mployees do not retain any continuing right to severance payments after their operation is sold by their former employer." *Bradwell v. GAF Corp.*, 954 F.2d at 801; *accord Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1348-49 (4th Cir. 1989).

And, in sister circuits, continuing employment sufficient to defeat a severance benefit claim does not require *identical* benefits; the successor's total benefit package need not be the same. *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 931 (10th Cir. 1992). *Awbrey* confirms the holding of *Sejman v. Warner-Lambert Co.*, 889 F.2d at 1350, that comparable benefits do not mean identical benefits; some difference in the benefit plans are expected. In the instant case, the Eleventh Circuit indicated that entitlement to severance benefits should depend upon whether the successor employer continues to provide severance benefits and credits past service in calculating same. This twist is another point in conflict with other circuits, including the Tenth and Fourth.

The Eleventh Circuit's position on severance entitlement runs contrary not only to sister circuit holdings, but contrary to the purpose of severance pay authorized by ERISA. *See Headrick*, 24 F.3d at 1276. Plaintiffs fully concede that they are claiming entitlement to severance pursuant to an "employee welfare benefit plan" governed by ERISA. In fact, ERISA expressly defines the severance

component of employee benefits only in terms of job loss – unemployment. ERISA defines "employee welfare benefit plan" in terms of benefits provided by the employer "in the event of sickness, accident, disability, death or *unemployment*". 29 U.S.C. § 1002(1)(A) (emphasis added). *See Abbey v. Resolution Trust Corp.*, 984 F.2d 1201, 1205 (D.C. Cir. 1993) (Ginsburg, J.) ("[ERISA] plans that pay benefits upon job termination cushion employees against the impact of unemployment . . . ").

ERISA authorizes no benefit for change in corporate ownership. There is no ERISA entitlement for participant dissatisfaction with changes in corporate structure. Rather, ERISA expressly provides and sister circuits have held that, absent some express promise to the contrary, severance benefits require a loss of the job. Where no job is lost, the ERISA meaning of "termination" and/or "discharge" are not satisfied. There is no entitlement to benefits.

The Second, Fourth, Sixth, Seventh, Eighth and Tenth Circuits have recognized this ERISA concept and refuse to award benefits where there has been a change in ownership but no change in job status. The Eleventh Circuit has considered and rejected this approach. This Court's review is necessary to resolve this substantial circuit split on this important ERISA entitlement issue.

II. THE CIRCUIT SPLIT IS CONTRARY TO THIS COURT'S DIRECTIVE THAT ERISA BE UNIFORMLY APPLIED.

In enacting ERISA, Congress' intent was to achieve uniformity in the administration of employee benefit

plans; the elimination of varying standards and remedies created by differing jurisdictions. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10, 107 S.Ct. 2211, 96 L.Ed.2d 1, 10 (1987), *citing Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981). This Court has confirmed that ERISA benefit plans require administrative uniformity in interpretation. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 10; *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484, 112 L.Ed.2d 474 (1990).

The Ninth Circuit reiterated this goal in a recent opinion on preemption of state laws impacting severance benefits:

> ERISA allows each employer to create its own uniform plan, complying with only one set of rules (those of ERISA) and *capable of applying uniformly in all jurisdictions* where the employer might operate.

Simas v. Quaker Fabric Corp. of Fall River, 6 F.3d 849, 852 (9th Cir. 1993) (emphasis added), *citing Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 142.

The congressional objective of administrative and remedial uniformity is thwarted by the circuit split concerning ERISA severance benefit entitlement. Entitlement to ERISA governed severance benefits, in the event of a mere change in employer ownership or structure, has become just the patchwork that Congress sought to avoid. At this time, based upon the above-demonstrated circuit split, entitlement depends on the federal circuit in which the parties reside. Under the same severance plan, Georgia and Florida employers now have ERISA severance obligations which do not exist in New York or Missouri,

or in numerous other states around the country. The negative ramifications of this ERISA entitlement conflict are self evident. The Act was intended to eliminate just this type of patchwork entitlement.

The instant decision has sharply focused this ERISA inconsistency, which is contrary to congressional intent and this Court's directive. *Fort Halifax*, 482 U.S. at 10; *Ingersoll-Rand*, 498 U.S. at 142. Review is required to resolve the issues of severance entitlement where jobs continue without interruption in the course of an ownership or structural change.

III. THE CIRCUIT COURT DECISION IS IN CONFLICT WITH THIS COURT'S HOLDING IN *FIRESTONE TIRE & RUBBER CO. v. BRUCH.*

Before and after the *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) ("*Bruch*") *de novo* standard of review, contract and trust principles governed ERISA entitlement rights. 29 U.S.C. § 1132. Where plan terms are clear and unambiguous, they must be enforced as written. *Brown v. Ampco-Pittsburg Corp.*, 876 F.2d 546 (6th Cir. 1989). The arbitrary and capricious standard never permitted the plan administrator or the court to override plain and unambiguous contract rights. *Id.*

However, before and after the *de novo* standard of *Bruch*, in the event of any ambiguity in plan language, the settlor's intent, purpose, and past practice must guide the court. *See, e.g., Bradwell v. GAF Corp.*, 954 F.2d 798 (2d Cir. 1992); *Adams v. Avondale Indus., Inc.*, 712 F. Supp. 1291, 1296 (S.D. Ohio 1989), *aff'd in relevant part*, 905 F.2d 943

(6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *Goggans v. Container Corp. of America*, 714 F. Supp. 282, 284-85 (S.D. Ohio 1989).

Petitioners submit that, in light of the parties' dispute concerning meaning of plan terms and the total absence of any clear, unequivocal promise that severance would be paid in the event of an ownership change, the Eleventh Circuit was required, at the very least, to acknowledge the existence of an ambiguity in plan language and to make the prescribed *Bruch* analysis.

Under the *Bruch* directive, where a plan term is susceptible to more than one reasonable meaning or interpretation, then the court is obliged to supply the proper construction by examining all relevant circumstances, with particular emphasis on the intent and practices of the employer that created and maintained the plan. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 112.

> The terms of trust created by written instrument are "determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust. . . . "

Id.

In this case, in a joint stipulation filed after oral argument and in response to questions by the circuit court panel, the parties concurred that, while they each believed their respective interpretations to be "plain" and "unambiguous", they strongly disagreed concerning the meaning of such language and acknowledged that their interpretations were "different and on crucial points,

diametrically opposed." App. 35. This ambiguity is further underscored by the sharp circuit split on this very issue.

In light of this stipulation, the ongoing debate concerning the meaning of plan language, and the absence of any plan explanation to unequivocally resolve the issue, the circuit court was obliged under *Bruch* to declare the provision ambiguous and to follow *Bruch's* directive and consider extrinsic evidence, with particular reference to settlor intent in creating and practice in implementing the plan. The Petitioners urged such approach, however the circuit court refused such approach in favor of its conclusion that the phrase "discharged as a full-time staffer" conveys the clear and unequivocal commitment to provide a severance benefit in the event of an MGA ownership change, regardless of the fact that employment continues uninterrupted and unchanged. In fact, given the plan language at issue and the Times' fifty year interpretation of the plan to require job loss, the Times' plan administrator could well have been charged with violation of fiduciary duty if it had discarded this consistency and found severance entitlement where no job was lost. *See* 29 U.S.C. § 1104(a)(1)(D) ("a fiduciary shall discharge his duties with respect to a plan . . . in accordance with the documents and instruments"). Certainly, this record contains no clear and unambiguous promise of severance under the circumstance of this case. This Court's review is mandated to address the conflict in the Eleventh Circuit's failure to adhere to this Court's *Bruch* directive.

CONCLUSION

For all the reasons stated above, Petitioners respectfully urge the Court to issue the writ and resolve the demonstrated conflict.

Respectfully submitted,

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v.

MODERN GRAPHIC ARTS, and Times Publishing Company, d/b/a St. Petersburg Times, Defendants-Appellees.

No. 92-2210.

United States Court of Appeals,
Eleventh Circuit.

March 9, 1994.

Following employer's sale of company, employees whose employment was maintained brought action against employer and alleged administrator of an employee benefit plan under ERISA, alleging entitlement to severance pay. The United States District Court for the Middle District of Florida, No. 89-1668-CIV-T-17(C), Elizabeth A. Kovachevich, J., 782 F.Supp. 604, granted defendants' motion for summary judgment and appeal was taken. The Court of Appeals, Clark, Senior Circuit Judge, held that employees whose employment had been terminated due to employer's sale of assets were entitled to severance pay benefits, even though they were all immediately reemployed by buyer of assets.

Reversed and remanded.

Appeal from the United States District Court for the Middle District of Florida.

Before DUBINA, Circuit Judge, CLARK and ESCHBACH*, Senior Circuit Judges.

CLARK, Senior Circuit Judge:

This is a class action brought by a group of employees to recover benefits due them under the terms of a plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* Plaintiffs contend that they were entitled to severance pay benefits when the company for which they worked was sold. The district court granted defendants' motion for summary judgment, holding that plaintiffs were not entitled to severance pay benefits under the terms of their former employer's severance pay policy because plaintiffs were employed by the new owner of the company 782 F.Supp. 604. We find that the district court misconstrued the terms of the severance pay policy. Accordingly, we reverse.

FACTS

Each member of the plaintiff class is a former employee of Modern Graphic Arts, Inc. ("MGA"), a printing business located in Tampa, Florida. MGA was a wholly-owned subsidiary of Times Publishing Company (the "Times"). MGA's employee benefits plans were set out in MGA's *Staffer Handbook* and Times Publishing Company's *Times-O-Guide*. The *Staffer Handbook* begins with the statement:

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

> This handbook has been prepared so that you may be better informed about the policies, procedures, benefits and other issues concerning your employment here. It is intended only to be a supplement to the *Times-O-Guide* you received at check-in at the Times Personnel Office. If a different interpretation or conflict exists between the Times-O-Guide and this handbook, the Times-O-Guide will prevail unless specifically identified to the contrary.[1]

MGA's and the Times' severance pay policy is set out in the *Times-O-Guide* in a section entitled "Termination." This section provides:

> Our hope is that every staffer who joins the company will stay until retirement. However, we realize this is unrealistic and there will be turnover. Such separations, whether through resignation or discharge are simpler when certain ground rules are stated and understood.
>
> 1. When you resign, you should give notice. Two weeks is customary.
>
> 2. If, after the first six months, you are discharged as a full-time staffer for reasons other than cause (see examples below), the company will pay you 1 week's pay-in-lieu of notice for each 6 months of service. This amounts to 2 weeks' pay for 1 year of service, 10 weeks' pay for 5 years of service, etc. No pay-in-lieu of notice is paid for less than six months' service, nor for fractional parts of six-month periods.[2]

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[1] *Modern Graphic Arts, Inc. Staffer Handbook* at 1.

[2] *Times-O-Guide* at 30. MGA's *Staffer Handbook* also sets out

The section goes on to give examples of discharge "for cause." These include a violation of confidence, dishonesty, intoxication on the job, conviction of a crime, unreported absence, destruction of company property, willful neglect of duty, insubordination, and offensive conduct.

In 1989, the Times sold substantially all of the assets of MGA to a new owner. The new owner retained the former employees of MGA in their same jobs at the same salary levels. The new owner did not, however, give the former MGA employees credit for their years of service at MGA for purposes of accruing and calculating severance pay benefits. Thus, plaintiffs, especially those who had been with MGA for many years, lost substantial severance pay benefits. Plaintiffs did not have the option of remaining in the employ or [sic] either MGA or the Times.

After both MGA and the Times denied plaintiffs' request for severance pay benefits, plaintiffs filed this action pursuant to 29 U.S.C. § 1132(a)(1)(B) to recover the benefits allegedly due them. Plaintiffs' amended complaint states two counts: Count I seeks recovery of the severance pay benefits from MGA, and count II seeks recovery of the same benefits from the Times. Plaintiffs eventually filed a motion for partial summary judgment as to liability, requesting that the district court "grant

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the severance pay policy, but in a less detailed manner. It provides: "if terminated without cause a staffer is entitled to one week's pay for each complete six month period of employment upon termination. Termination with cause is defined in the Times-O-Guide." *Modern Graphic Arts, Inc. Staffer Handbook* at 12.

summary judgment as to liability against Modern Graphic Arts, Inc. and Times Publishing Company, jointly and severally."[3] Defendants opposed this motion and filed their own motion for summary judgment on all claims, arguing that plaintiffs were not "discharged" within the meaning of MGA's and the Times' severance pay policy because they were employed by the new owner. The Times also filed an alternative motion for summary judgment on count II, arguing that even if plaintiffs were "discharged" within the meaning of the severance pay policy, they were employees of MGA, not of the Times, and, therefore, were not entitled to recover benefits from the Times.

The district court held that plaintiffs were not entitled to benefits under the terms of the severance pay policy because they were never unemployed. Accordingly, the district court denied plaintiffs' motion for partial summary judgment as to liability and granted defendants' motion for summary judgment on all claims. The district court did not reach the issues raised in the Times' alternative motion for summary judgment on count II. Plaintiffs appealed.

DISCUSSION

Prior to the Supreme Court's decision in *Firestone Tire and Rubber Co. v. Bruch*,[4] federal courts reviewed an employer's interpretation of a benefit plan governed by

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[3] R2-55-3.

[4] 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

ERISA under an arbitrary and capricious standard.[5] In *Bruch*, however, the Supreme Court rejected the general application of the arbitrary and capricious standard. Noting that "ERISA abounds in the language and terminology of trust law,"[6] the Court held:

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.[7]

In this case, defendants do not contend that their benefit plan gives an administrator or fiduciary the discretionary authority described in *Bruch*. Accordingly, we review *de novo* defendants' interpretation of their severance pay policy. In interpreting the terms of this severance pay policy, we look to the intent of the parties; however, "where a disputed term is unambiguous, we presume its natural meaning to be conclusive evidence of such intent."[8]

The severance pay policy at issue here provides that an employee who is "discharged *as a full-time staffer* for

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[5] *See, e.g., Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1521 (11th Cir.), *cert. denied*, 474 U.S. 995, 106 S.Ct. 410, 88 L.Ed.2d 360 (1985).

[6] *Bruch*, 489 U.S. at 110, 109 S.Ct. at 954.

[7] *Id.* at 115, 109 S.Ct. at 956-57.

[8] *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 30 and n. 5 (1st Cir. 1991) (citing, among other things, *Bruch*, 489 U.S. at 112, 109 S.Ct. at 954, and Restatement (Second) of Trusts § 164 Comment e (1959)).

reasons other than cause"[9] will receive severance pay. The interpretation of this provision turns on the construction of the term "staffer." This term is used repeatedly throughout both the *Times-O-Guide* and MGA's *Staffer Handbook*. Although "staffer" is not defined in either of these publications, its meaning is clear. As used in the *Times-O-Guide*, "staffers" means employees of the Times and its affiliates, including wholly-owned subsidiaries such as MGA.[10] As used in MGA's *Staffer Handbook*, the term means employees of MGA.[11] Thus, "discharged as a full-time staffer" means discharged as a full-time employee of the Times or one of its affiliates, in this case, MGA.

Other language in the "Termination" section of the *Times-O-Guide* is consistent with this interpretation. This section begins with the statement: "Our hope is that every staffer who joins the company will stay until retirement."[12] Shortly after this statement is the severance pay provision, which is a means to protect employees who, through no fault of their own, cannot remain with "the company" until retirement. Clearly, "the company" refers

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[9] *Times-O-Guide* at 30 (emphasis added).

[10] *See, e.g., Times-O-Guide* at 24 ("Under certain conditions, we grant employment credit to staffers who have been previously employed by the Times Publishing Company and its affiliates. . . . ").

[11] *See e.g., Modern Graphic Arts, Inc. Staffer Handbook* at 1 ("For our new staffers, this booklet will introduce our organization to you and give you information about our various benefits and policies which apply to you as a staffer of Modern Graphic Arts, Inc.").

[12] *Times-O-Guide* at 30.

to the Times and its affiliates, *not* to some entity that happens to purchase the assets of one of the affiliates. We see no ambiguity in the crucial terms. Applying the plain and natural meaning of the provisions discussed above, plaintiffs were entitled to severance pay when their employment with MGA was terminated, regardless of whether they were employed by the entity that purchased MGA's assets.

Our conclusion does not result in a windfall to plaintiffs. When plaintiffs' employment with MGA ceased, plaintiffs lost substantial severance pay benefits because, at least for purposes of severance pay, they lost credit for their years of service with MGA. We find instructive language from the Second Circuit's opinion in *Bradwell v. GAF Corp.*[13] In that case, former employees of GAF sought severance pay after GAF sold to BASF the facility at which the employees worked. The Second Circuit concluded that the employees were not entitled to severance pay because they did not lose any severance pay benefits when their employer changed. Noting that one of the objectives of severance pay policies is to reward employees for past service to the company, the Second Circuit reasoned:

> Because BASF absorbed the Severance Pay Policy, and under it severance allowances upon layoff were to be based on continuous service including service to GAF, we do not perceive that employees' service to the company was in

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[13] 954 F.2d 798 (2d Cir. 1992).

> any way disregarded by GAF's denial of severance pay here.[14]

Here, we are faced with a situation in which plaintiffs' entitlement to severance pay was denied by MGA/Times and the new owner will not credit plaintiffs' past service to MGA/Times for severance pay purposes. We express no opinion as to the outcome of this case as between the defendants. We merely note that plaintiffs' loss of severance pay benefits is a factor we considered in reaching our conclusion that plaintiffs are entitled to benefits under either the Times' or MGA's severance pay policy.

Our conclusion is consistent with recent case law from other circuits. For example, in *Bellino v. Schlumberger Technologies, Inc.*, plaintiffs ceased to be employees of Schlumberger and became employees of National Semiconductor Corporation when National Semiconductor took over maintenance work that had been performed by Schlumberger. Under Schlumberger's benefits plan, Schlumberger provided salary continuation when it "terminate[d] an employee for lack of work, poor business conditions, or change in business focus."[15] The First Circuit held that plaintiffs were entitled to severance pay benefits, notwithstanding that they were never unemployed. The Court explained:

> We agree with the finding of the district court that the above Plan language is clear and unambiguous as applied to the facts of this case and that it entitles appellees to severance benefits. As an initial matter, there can be no dispute

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[14] *Id.* at 801.

[15] 944 F.2d at 30.

> that appellees were "terminated" within the plain meaning of the Plan. As it appears in the Plan, "termination" is defined broadly and encompasses those situations in which Schlumberger ceases to employ an individual. It is uncontested that Schlumberger ended its employment relationships with [plaintiffs]. . . .
>
> Additionally, there is no genuine dispute that [plaintiffs'] terminations were involuntary. Schlumberger did not give [plaintiffs] the option to remain as employees; they were to choose either resignation or employment with NSC.[16]

Similarly, here, the term "discharged" as used in the *Times-O-Guide* encompasses those situations when an employee ceases to be a "staffer," that is, an employee of the Times or one of its affiliates. Plaintiffs in this case were not given the option to remain with the Times or MGA; they had to choose either resignation or employment with the new owner. Like the plaintiffs in *Bellino*, plaintiffs in this case are entitled to severance benefits.

This case is also similar to *Ulmer v. Harsco Corp.*,[17] in which former employees of Harsco Corporation sought severance pay following the sale of the division for which they worked. The district court had held that the employees were not entitled to severance pay because they were employed by the new owner. The Third Circuit reversed, stating:

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[16] *Id.*

[17] 884 F.2d 98 (3d Cir. 1989).

> "[C]ontinuing employment" is properly construed to mean employment with *Harsco's* Casting Division, not with an acquiror of the Casting Division's assets/operations. The Plan states that "[t]o further our concept of career employment, the Company will take all reasonable steps to provide continuing employment . . . ". If the district court's interpretation were correct, then it would follow that Harsco's Casting Division's concept of "career employment" as outlined in the Plan would be satisfied by employees working for a different employer/owner, albeit at the same plant. We do not think that such a construction comports with the plain meaning of the Plan.[18]

Similarly, here, the Times' career employment concept is reflected in the *Times-O-Guide:* "Our hope is that every staffer who joins the company will stay until retirement."[19] To encourage employees to remain with the company, it committed itself as follows: "If, after the first six months, you are discharged as a full-time staffer for reasons other than cause . . . , the company will pay you 1 week's pay-in-lieu of notice for each 6 months of service."[20]

This Circuit has not yet applied the *de novo* standard articulated in *Bruch* in construing a severance pay policy following sale of the company.[21] There are, however, two

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[18] *Id.* at 102.

[19] *Times-O-Guide* at 30.

[20] *Id.*

[21] Although *Blank v. Bethlehem Steel Corp.*, 926 F.2d 1090 (11th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 372, 116 L.Ed.2d

pre-*Bruch* cases that are instructive. First, in *Harris v. Pullman Standard, Inc.*[22] Pullman, the employer, sold one of its operations to Trinity Industries, Inc. The plaintiffs were employed by Trinity, performing the same jobs that they had done for Pullman, but at a slightly reduced salary and with a benefit package that was not as favorable as that of Pullman. The district court held that Pullman's decision to deny the plaintiffs severance pay was arbitrary and capricious. This court affirmed, stating:

> The policy terms indicate that an employee will be eligible for a termination allowance if the employee's job is eliminated, and a new assignment cannot be found for him within the company. In the context of the policy, the term "company" refers only to Pullman, not successive corporations. Pullman eliminated plaintiffs' jobs by the sale of the manufacturing plant to Trinity. Subsequently, Pullman failed to offer plaintiffs new opportunities within its company, so the plaintiffs became eligible for severance pay. The policy does not provide any exceptions to this eligibility if the corporate ownership changes and Pullman's employees obtain jobs with the new corporation. We are guided by the language of the policy, and any interpretation that contradicts the clear wording of the policy has to be arbitrary and capricious.[23]

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324 (1991), was decided after *Bruch*, the court in *Blank* applied an arbitrary and capricious standard based on the terms of the plan at issue.

[22] 809 F.2d 1495 (11th Cir. 1987).

[23] *Id.* at 1498.

The severance pay policy at issue here is similar to Pullman's plan in that the term "company" refers only to the Times and its affiliates, not successive corporations, and in that there are no exceptions to severance pay eligibility based on retention of employment with a successive corporation. While the policy at issue here differs from the Pullman plan in other ways, these similarities support our decision in this case.

Second, in *Anderson v. Ciba-Geigy Corp.*, the purchasing corporation retained the plaintiffs at their same salaries and job positions, but the plaintiffs lost seniority rights and vacation benefits. The former employer set forth two arguments in support of its decision to deny the plaintiffs' request for severance pay. First, the former employer argued that plaintiffs were never "terminated" because they remained employed. Second, the former employer argued that the corporate sale was a "special situation" under a unique provision of its benefits plan. While this court found for the former employer based on the second argument, it stated that the first argument "is probably legally wrong."[24] The court explained: "While it is true that plaintiffs never suffered a termination of actual employment – they were, after all, never unemployed – Ciba-Geigy's Employee Benefit Plan does not define 'termination' in that manner."[25] Likewise, the severance pay policy at issue here does not define "discharge" or "termination" to require unemployment.

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[24] 759 F.2d at 1521.

[25] *Id.*

Defendants rely on this court's decision in *Blank v. Bethlehem Steel Corp. Blank* is distinguishable from this case in several respects. First, *Blank* involved the interpretation of a retirement benefit very different from the severance pay benefit at issue in this case. Second, unlike this case, the employees in *Blank* were given credit for their work both with the former employer and with the purchaser for purposes of the benefit at issue. Finally, the court in *Blank* reviewed the employer's decision to deny benefits under an arbitrary and capricious, rather than *de novo,* standard. As the Sixth Circuit has said: "Courts should proceed carefully before applying rules developed specifically to ferret out arbitrary and capricious action when interpreting the terms of a plan *de novo.*"[26] We do not find *Blank* helpful in deciding this case.

Defendants also rely on cases from other circuits in which the courts have ruled against employees seeking severance pay following the sale of the company for which they work. Many of these cases predate *Bruch;* thus, the courts applied an arbitrary and capricious, rather than a *de novo,* standard of review to the employer's decision to deny benefits.[27] Moreover, each of

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[26] *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 950 (6th Cir.), *cert. denied*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990).

[27] For example, the courts in *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986), *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985), and *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983), applied an arbitrary and capricious standard of review. Although *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541 (8th Cir. 1989), was decided after *Bruch*, the court applied an

these cases, as well as the cases upon which defendants rely that apply a *de novo* standard of review, are distinguishable from this case. As the First Circuit said in *Bellino:*

> Federal courts have established no hard and fast rule that an individual must suffer a period of unemployment to qualify for severance benefits under ERISA. Those courts that have deemed unemployment a prerequisite to such benefits have predicated their decisions on the particular terms of the ERISA plan at issue and its application to the specific facts before them.[28]

Each of the cases upon which defendants rely involve ERISA plans with terms distinct from the terms of the policy at issue in this case.[29] Under the particular terms of the Times' and MGA's severance benefits policy, as applied to the specific facts before us, we find that plaintiffs are entitled to severance pay.

We express no opinion as to the Times' alternative motion for summary judgment on count II, that is, the Times' argument that plaintiffs were employees of MGA,

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arbitrary and capricious standard based on the language of the plan at issue.

[28] *Bellino,* 944 F.2d at 31.

[29] *See Allen v. Adage, Inc.,* 967 F.2d 695 (1st Cir. 1992) (plaintiffs not entitled to severance pay because parties intended that phrase "reduction in force" have an economic dimension requiring unemployment; *Awbrey v. Pennzoil Co.,* 961 F.2d 928 (10th Cir. 1992) (plaintiffs not entitled to severance pay because they were "offered a comparable job" within the meaning of the plan); *Harper v. R.H. Macy & Co., Inc.,* 920 F.2d 544 (8th Cir. 1990) (plaintiffs not entitled to severance pay because they were not "permanently terminated" within the meaning of the plan)

not of the Times, and, therefore, are not entitled to recover benefits from the Times. We leave this for the district court to decide in the first instance on remand.

CONCLUSION

For reasons discussed above, the decision of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2210

D.C. Docket No. 89-1668-CIV-T-17(C)

WILLIAM C. BEDINGHAUS, ROBERT D. BACON and BARBARA J. ORR, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

versus

MODERN GRAPHIC ARTS, and TIMES PUBLISHING COMPANY, d/b/a St. Petersburg Times,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITIONS FOR PANEL REHEARING
FILED BY APPELLANTS AND APPELLEES

(Filed Apr. 28, 1994)

Before DUBINA, Circuit Judge, CLARK and ESCHBACH* Senior Circuit Judges.

PER CURIAM:

Appellants' petition for rehearing, which requests that the Court modify its opinion of March 9, 1994, is

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

GRANTED. The court orders that its opinion, found at 15 F.3d 1027, be modified as follows:

(1) By *adding* a footnote on page 1028 following the sentence "In 1989, the Times sold substantially all of the assets of MGA to a new owner." Fn The footnote will read: "The new owner was MGA Holdings, Inc., who is not a party to these proceedings."

(2) On page 1030, *delete* the following sentence appearing at the bottom of the left-hand column: "We express no opinion as to the outcome of this case as between the defendants."

(3) On page 1033, *delete* the first full paragraph, which reads:

> We express no opinion as to the Times' alternative motion for summary judgment on count II, that is, the Times' argument that plaintiffs were employees of MGA, not of the Times, and, therefore, are not entitled to recover benefits from the Times. We leave this for the district court to decide in the first instance on remand.

In all other respects, the opinion remains unchanged.

The petition for rehearing filed by appellees is DENIED.

United States District Court
MIDDLE DISTRICT OF FLORIDA

WILLIAM C. BEDINGHAUS, ROBERT D. BACON, and BARBARA J. ORR, individually and on behalf of all other similarly situated,

Plaintiffs,

V.

MODERN GRAPHIC ARTS, INC., and TIMES PUBLISHING COMPANY d/b/a ST. PETERSBURG TIMES,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 89-1668-Civ-T-17(C)

(Filed Feb. 5, 1992)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. ~~The issues have been tried or heard~~ and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' joint motion for summary judgment on all pending claims is granted, and Plaintiffs' motion for partial summary judgment as to liability is denied. Final Judgment of dismissal is entered in favor of Defendants.

February 5, 1992
Date

DAVID L. EDWARDS
Clerk

/s/ Rebecca J. Hockett
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM C. BEDINGHAUS, ROBERT D. BACON, and BARBARA J. ORR, individually and on behalf of all other similarly situated, Plaintiffs, vs. MODERN GRAPHIC ARTS, INC., and TIMES PUBLISHING COMPANY d/b/a/ ST. PETERSBURG TIMES, Defendants,	CASE NO. 89-1668-CIV-T-17C

ORDER ON MOTION FOR SUMMARY JUDGMENT

(Filed Feb. 5, 1992)

This cause is before the Court on the following motions and responses:

1. Plaintiffs' motion for partial summary judgment as to liability, filed on August 26, 1991.

2. Plaintiffs' memorandum of law in support of motion for partial summary judgment as to liability, filed on August 26, 1991.

3. Defendants' joint motion for summary judgment on all pending claims, filed on August 27, 1991.

4. Defendants' memorandum of law in support of their joint motion for summary judgment, filed on August 27, 1991.

5. Defendant Times' alternative motion for summary judgment on Count II, filed on September 4, 1991.

6. Defendant Times' memorandum in support of alternative motion for summary judgment on Count II, filed on September 4, 1991.

7. Defendants' memorandum in opposition to Plaintiffs' motion for partial summary judgment, filed on October 16, 1991.

8. Plaintiffs' memorandum in response to Defendants' joint motion for summary judgment, filed on October 16, 1991.

9. Plaintiffs' memorandum in response to Defendant Times' alternative motion for summary judgment on Count I, filed on October 16, 1991.

This circuit clearly holds that summary judgment should only be entered when the nonmoving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *Sweat v. The Miller Brewing Co.*, 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant*, 595 F.2d 994, 996-97 (5th Cir. 1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986),

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery And upon motion, against a party who fails to establish the party's case, and on which that party will bear the burden of proof at trial. *Id.* at 273.

The Court also said, "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, designate 'specific facts showing there is a genuine issue for trial' " *Celotex Corp.*, at p. 274.

This Court finds that there is an absence of a genuine issue as to any material fact present in this case. Therefore, this case will be decided as a matter of law.

FACTS:

Plaintiffs class is made up of persons who were employees of Modern Graphic Arts, Inc. In or about April of 1989, Modern Graphic Arts, Inc. sold substantially all of its assets and goodwill to MGA Holdings, Inc. ("the sale"). Prior to the sale, the majority of the voting stock of Modern Graphic Arts, Inc. was owned and controlled by the Times Publishing Co. (doing business as the St. Petersburg Times). Most of the class members now work for MGA Holdings, Inc.

At the time of and prior to the sale, Modern Graphic Arts, Inc. maintained an employee policy manual entitled

Staffer Handbook which outlined the policies, procedures, and benefits applicable to its employees. The Staffer Handbook stated in its Introduction that it was intended only to be a supplement to the Times-O-Guide (Times Publishing Co. benefit manual) which each employee received at their check-in at the Times Personnel Office. Each new hire to Modern Graphic Arts, Inc. reported to the St. Petersburg Times for check-in prior to reporting to Modern Graphic Arts, Inc. The Staffer Handbook included a benefit entitled "IN-LIEU PAY". The "IN-LIEU PAY" benefit provided for the payment of severance pay upon termination without cause as defined in the Times-O-Guide. Plaintiffs claim that the "IN-LIEU PAY" is an unfunded employee benefit plan under ERISA.

Prior to the sale, a representative of the class inquired of the President of Modern Graphic Arts, Inc. whether the class members would be paid "IN-LIEU PAY" upon the sale of Modern Graphic Arts, Inc. The president, Mr. O'Hearn, responded that the employees (class members) would not receive "IN-LIEU PAY" as they would not be unemployed upon the sale of Modern Graphic Arts, Inc. Each employee was to be maintained by MGA Holdings.

The employees took the position that they were no longer employe d [sic] by Modern Graphic Arts, Inc. and were thus terminated by Modern Graphic Arts, Inc. upon its sale. They contend that this severance was for no cause of their own and they are therefore entitled to "IN-LIEU PAY" under their benefits plan. Defendants claim that Plaintiffs accepted employment with the purchaser of Modern Graphic Arts, Inc. and as a result of continued, uninterrupted employment, Plaintiffs were never "terminated", "separated" or "discharged" as those terms are

used in relevant provisions of the Staffer Handbook and/or provisions of the Times-O-Guide incorporated therein. They also take the position that the Defendants interpretation and application of eligibility and severance benefit provisions is fully consistent with the purpose, history, terms and intent of the subject severance benefit plans.

Defendants alternatively claim that the Plaintiffs are barred from recovery because they were not participants in the severance plan sponsored by the Times and covering Times Employees. Defendants claim that Plaintiffs were not employees of the Times Publishing Co. for purposes of payment of benefits.

ISSUES:

The ultimate issues which Plaintiffs seek to have the Court determine are whether upon the sale of Modern Graphic Arts, Inc., the employees of Modern Graphics were terminated and entitled to termination benefits; when their employment is maintained by the purchasing company, and if so entitled, if they were employees of the Times for purposes of benefit payments.

A. EMPLOYER

Plaintiffs argue that in addition to Modern Graphic Arts, Inc. as their employer, Times Publishing Company was also an employer of each class member, in that it was "acting directly as an employer, in relation to an employee benefit plan. ." 29 USCS §1002(5). As such, it

was the "plan sponsor" and "administrator" of the "TERMINATION" plan contained in the Times-O-Guide as applied to the class members.

The Court finds the Plaintiffs argument worth merit as 29 USCS §1002(16)(A) and (B) speak both to the person designated by the terms of the instrument and the employer who establishes or maintains the plan. The instrument itself stated that it was a supplement to the Times-O-Guide and that a definition of termination was found in the Times-O-Guide. Plaintiffs were also instructed that any questions with regard to benefits should be addressed to the Times office. Plaintiffs were clearly led to believe that the Times Publishing Company was the administrator of their benefits.

Under 29 USCS §1002(7), each member of the Plaintiff class was a "participant" because each is a "former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization . . . ". 29 USCS §1132(a)(1)(B) then permits recovery of benefits due if in fact so due.

B. APPLICABLE STANDARD OF REVIEW

Plaintiffs argue that the Defendants' denial of Plaintiffs claims to severance pay in connection with the sale is subject to a *de novo* review by this Court. Plaintiffs contend that the administrator or fiduciary of the plan was not given discretionary authority under the plan to determine eligibility for benefits or to construe the terms of the plan.

The validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue. Consistent with established principles of trust law, a denial of benefits challenged under §1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. For purposes of actions under §1132(a)(1)(B), the *de novo* standard applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989). The subject plan does not provide that either Modern Graphic Arts, Inc. or Times Publishing Company has the authority to determine eligibility for benefits. The Court finds that the applicable standard of review is the *de novo* standard.

C. CONSTRUCTION OF "TERMINATION"

Plaintiffs contend that the proper construction of "TERMINATION" is not unemployment but a termination between employer and employee as regards the employment. Plaintiffs state that each transferred employee was "discharged as a full-time staffer" under the Times-O-Guide, or suffered a "termination" under the Staffer Handbook.

Under a *de novo* review, the terms in the plan at issue must be interpreted by the reviewing Court. Unless the plan language specifies otherwise, courts should construe any disputed language 'without deferring to either

party's interpretation' *Brewer v. Lincoln Nar. Life Ins. Co.*, 921 F.2d 150, 153-54 (8th Cir. 1990). The issue is "simply one of contract interpretation." *Harper v. R.H. Macy & Co., Inc.*, 920 F. 2d 544, 545 (8th Cir. 1990). Modern Graphic Arts, Inc.'s Staffer Handbook contains an Introduction that states it is intended only to be a supplement to the Times-O-Guide that each employee received at check-in time at the Times Personnel Office. It also states that if a different interpretation or conflict exists between the Times-O-Guide and the Staffer Handbook, the Times-O-Guide will prevail unless specifically identified to the contrary.

The "IN-LIEU PAY" provision in question states that if an employee is terminated without cause, a staffer is entitled to one week's pay for each complete six month period of employment upon termination. Termination with cause is defined in the Times-O-Guide. In looking at the Times-O-Guide, under Termination, it states, "Our hope is that every staffer who joins the company will stay until retirement. However, we realize this is unrealistic and there will be turnover. Such separations, whether through resignation or discharge are simpler when certain ground rules are stated and understood."

According to the terms of Modern Graphic Arts, Inc.'s policy read along with the terms of the Times policy, the plaintiffs were not involuntarily terminated when the employer-employee relationship was terminated. The policies contemplate unemployment as the result of any termination that would lead to the payment of "IN-LIEU PAY". The Times-O-Guide reads "Such separations, whether through resignation or discharge . . . ". Such language clearly lends a reader to the conclusion

that an employee would be unemployed after the 'separation' no matter how short the term of unemployment. Plaintiffs at no time were unemployed under the terms of the sale of Modern Graphic Arts, Inc.

The 11th Circuit has held that the 'form' of termination is the controlling factor. In *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1521 (11th Cir. 1985) cert. denied, 474 U.S. 995, 106 S.Ct. 410, 88 L.Ed.2d 360 (1985), it was found that the "form" of termination was the controlling factor under Ciba-Geigy's own definition of the word. In Ciba-Geigy's Employee Benefit Plan, termination was paid to employees terminated for other than cause. Examples of 'other than cause' included corporate reorganizations. Plaintiffs here can not point to such examples to demonstrate the basis for their belief that they should be paid "IN-LIEU PAY". Likewise, in *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1498 (11th Cir. 1987), the Court found that according to the terms of Pullman's own policy, the sale of the corporation involuntarily terminated the plaintiffs' jobs, thereby making them eligible for severance pay. The terms of Pullman's policy indicated that an employee would be eligible for a termination allowance if the employee's job is eliminated, and a new assignment cannot be found for him within the company. The policy also stated that for all involuntary terminations "other than layoff", the termination allowance would be granted. Modern Graphic Arts, Inc. and Times Publishing Co. did not lead the Plaintiffs to believe that they would be found a new position within the company. Nor did it limit exclusions from benefits for terminations to layoffs.

Likewise, in *Blank v. Bethlehem Steel Corp.*, 926 F.2d 1090, 1093 (11th Cir. 1991), that court stated that other

courts have held that an employee who continues employment with a purchasing corporation has not experienced a layoff by the original employer. Only where the benefit plan calls for continuing employment with the selling employer have courts stated that employment by a purchasing corporation is not considered continued employment and therefore the effected employees are entitled to termination pay. "To further our concept of career employment, the Company will take all practical steps to provide continuing employment, . . . " was held to guarantee employment with the selling company and not interpreted to mean employment with a purchasing company. *Ulmer v. Haesco Corp.*, 884 F. 2d 98, 99 (3d Cir. 1989).

Plaintiffs do not have the benefit of illustrating that their benefits guaranteed continued employment with Modern Graphic Arts, Inc. On the contrary, the benefits available to Plaintiffs seemed to be a guarantee only on unemployment for something other than cause. Plaintiffs were never unemployed.

In light of the provisions in Modern Graphic Arts, Inc,'s benefit's manual together with the provisions in Times Publishing Co.'s Times-O-Guide, it is the opinion of this Court that the plaintiffs are not entitled to termination benefits under their respective plan in the event of the sale of the company by the corporation. Accordingly, it is

ORDERED that Defendants' joint motion for summary judgment on all pending claims is **granted,** and Plaintiff's motion for partial summary judgment as to

liability is **denied.** The Clerk is directed to enter a final judgment of dismissal in favor of Defendants.

DONE AND ORDERED in Chambers, in Tampa, Florida on this 5th day of February 1992.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United Stated [sic] District Judge

Copies to:
All parties and counsel of record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

William C. Bedinghaus, Robert D. Bacon, and Barbara J. Orr, individually and on behalf of all others similarly situated,	Appellate Case #92-2210
Appellants,	Appeal from the U.S. District Court, Middle District of Florida
vs.	Case #89-1668-CIV-T-17C Class Representation
Modern Graphic Arts, Inc., and Times Publishing Company d/b/a St. Petersburg Times,	
Appellees	

JOINT STIPULATION TO CLARIFY DEFENDANTS-APPELLEES CITATION OF SUPPLEMENTAL AUTHORITY, DATED MARCH 18, 1993

(Filed April 6, 1993)

Plaintiffs-Appellants ("Plaintiffs") and Defendants-Appellees ("Defendants") jointly, through their counsel, hereby file this Stipulation to clarify Defendants' Citation of Supplemental Authority, submitted to the Court pursuant to Fed.R.App.P. 28(j), by letter to the Clerk of Court dated March 18, 1993.

1.

This matter came before the Court for Oral Argument on March 18, 1993. On March 16, 1993, pursuant to Fed.R.App.P. 28(j), the Defendants prepared a Citation of

Supplemental Authority for submission to the Court (the "March 16 Citation"). During preparation for oral argument on March 17, 1993, the Defendants prepared a second letter, pursuant to Fed.R.App.P. 28(j), setting forth additional citations for presentation dated March 18, 1993 (the "March 18 Citation"). The March 16 and March 18 Citations are on file with the Clerk of Court pursuant to Fed.R.App.P. 28(j).

2.

On the morning of March 18, 1993, counsel for Defendants hand delivered a package of documents to Plaintiffs' counsel. Defendants believed the package contained the March 16 Citation and the final version of the March 18 Citation. Counsel for Defendants clearly recalls personally sorting the documents for delivery. However, counsel for Defendants did not realize that the package (which contained approximately 30-40 pages including photocopies of case citations) inadvertently included only a preliminary draft, and not the final version, of the March 18 Citation, in addition to the final March 16 Citation letter.

3.

Counsel for Defendants followed hand-delivery with mail service of the finalized March 18 Citation. After receipt of the mailed service copy of the finalized March 18 Citation, counsel for Plaintiffs and Defendants became aware that the draft March 18 Citation (rather than the final document) had been inadvertently delivered to Plaintiffs' counsel on the morning of March 18.

4.

During March 18 Oral Argument, in response to an inquiry by Senior Judge Thomas A. Clark, Plaintiffs' counsel cited the draft March 18 Citation for the proposition that counsel for Defendants had stated, in correspondence to the Court, that the language of the severance policies in question on this appeal was "unambiguous".[1] (Copy of draft document, inadvertently delivered to counsel for Plaintiff but never filed, is attached to this Stipulation).

5.

Throughout this litigation, both sides have described their respective interpretations of the subject severance policies to be "plain" and "unambiguous". However, they have strongly disagreed concerning the proper meaning and application of these policy terms. By the draft March 18 document inadvertently provided to Plaintiff's counsel, Defendants never stipulated, nor intended to suggest, that Plaintiff's interpretation of the policy was reasonable or unambiguous. The record reflects that the parties' interpretations of policy language are different and, on crucial points, diametrically opposed.

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[1] Upon hearing this exchange on rebuttal at Oral Argument, counsel for Defendants did not know precisely to what portion of either Citation counsel for Plaintiffs was referring and, since Oral Argument was about to end, had no opportunity to further address the matter.

Respectfully Submitted,

Modern Graphic Arts, Inc.
et al.,
Defendants-Appellees

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March 18, 1993

Office of the Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: Bedinghaus, et al. v. Modern Graphic Arts, Inc. et al.; File No. 92-2210.

Dear Clerk of Court:

Appellees MODERN GRAPHIC ARTS, INC. and TIMES PUBLISHING COMPANY ("Appellees"), through their undersigned counsel and pursuant to Fed.R.App.P. 28(j), respectfully submit this Citation of Supplemental Authorities in support of their opposition brief on appeal, and pertinent to oral argument in this cause. This letter presents citation to supplemental authorities which have recently come to the attention of Appellees, and which are highly pertinent to issues on appeal.

Construction of ERISA Plan Terms

Appellants suggested on Reply Brief that this court must construe any ambiguity in Plan Terms against Appellees, as drafters of the Plan. This assertion is incorrect; such a construction is contrary to the Supreme Court's pronouncement in *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 112, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989). The holding of *Bruch* is confirmed by recent authority, which has come to the attention of Appellees since filing their opposition brief. *Allen v. Adage, Inc.*, 967 F.2d. 695, 701 (1st Cir. 1992) (copy provided to the Court in letter of March 16, 1993); *see Taylor v. Continental Group*, 933 F.2d 1227, 1233 (3rd Cir. 1991) (court should not apply principle of construction against the drafter unless and until the court has attempted to determine the intended meaning without construing it in favor of any party) (attached hereto as Exhibit A); *Franklin v. Pitney Bowes, Inc.*, 919 F.2d 45, 48 (6th Cir. 1990) (declining to interpret terms of plan strictly against the company) (attached hereto as Exhibit B). These cases

confirm the holding of *Bruch*, that the Court should interpret plan terms without deferring to either party's interpretation. The plan terms at issue on this appeal are unambiguous, and should not be construed against Appellees as the drafter.

Summary Judgment Is Appropriate Even If Plan Language Is Ambiguous

Appellants also claimed on Reply Brief that summary judgment is not appropriate where plan terms are ambiguous. *Allen v. Adage, Inc., supra,* squarely refutes this contention. The question whether a contract term is ambiguous is a question of law for the court; even if the language presents an ambiguity, the evidence presented concerning the parties intended meaning may be so one-sided that no reasonable person could decide to the contrary. Summary judgment is fully appropriate in this case. *Allen*, 967 F.2d at 698; *Franklin v. Pitney Bowes, Inc., supra,* 919 F.2d at 47-48. Even if the plan terms at issue were ambiguous (they are not), the evidence presented as to the intended meaning of the terms uncontrovertedly establishes the meaning proffered by Appellees; summary judgment was fully appropriate.

Comparable Employment Does Not Mean Identical Benefits

Appellants further suggested on Reply Brief that since, in their view, one aspect of their benefit package with their new employer is somehow different than that which had been provided by Appellees, their new employment could not be "comparable" and severance

pay is mandated. This contention is flatly refuted by *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 931 (10th Cir. 1992) (attached hereto as Exhibit C). *Awbrey* confirms the holding of *Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1350 (4th Cir. 1989), cited in Appellees' brief in opposition, that comparable benefits do not mean identical benefits; some different in the benefit plans are expected. Severance pay is not mandated by provision of comparable, although not identical, benefits.

And, *Franklin v. Pitney Bowes* and *Allen v. Adage*, confirm Appellees' contention that employee's subjective expectations of continued employment or entitlement to severance benefits are irrelevant where the Plan terms do not support such hope or expectation. The language of the Plan, not the hopes of Appellants, controls.

Appellees believe that the cited *Taylor, Franklin*, and *Awbrey* cases are highly pertinent issues in this appeal.

Respectfully submitted,

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MCK/mec
Enclosures

cc: Senior Judge Thomas A. Clark (via Hand Delivery)
Senior Judge Jesse E. Eschbach (via Hand Delivery)
Judge Joel F. Dubina (via Hand Delivery)
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No. 94-443

In The

Supreme Court of the United States

October Term, 1994

MODERN GRAPHIC ARTS, INC.,
a Florida Corporation, and
TIMES PUBLISHING COMPANY, a Florida
Corporation d/b/a ST. PETERSBURG TIMES,

Petitioners,

vs.

WILLIAM C. BEDINGHAUS, ROBERT D. BACON,
BARBARA J. ORR, Individually and as
Class Representatives,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondents submit that the questions presented for review can be simplified as follows.

1. With regard to the interpretation of severance pay policies in connection with the sale of ongoing businesses, does this case conflict with other circuits?

2. If there is such a conflict among the circuits, can it be resolved by this Court's interpretation of the severance pay policy applicable to this case?

3. Did the Circuit Court's determination that the severance policy in this case was not ambiguous, and thus did not require resort to the Petitioners' extrinsic evidence to determine intent, conflict with this Court's ruling in *Firestone Tire & Rubber Co. v. Bruch*?

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Class Representatives,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents hereby oppose the Petition For A Writ Of Certiorari.

I. MISSTATEMENTS OF LAW AND FACT

The Petitioners have made several misstatements of the facts and the law. Petitioners state several times that the employees had a virtually identical benefit package after the sale. In fact, the purchasing corporation did not

have the same level of benefits, and did not carry over the years of service accrued by the employees for purposes of calculating severance pay. This fact was of record and noted by the Circuit Court in its opinion. (See Petitioners' Appendix-at pages 4 and 8).

The Petitioners suggest on page 7 of their Petition that the plaintiffs conceded in their depositions that the term "discharge" did not describe their transfer of employment to the successor corporation. This is a mischaracterization of the testimony of the class representatives. For example, an excerpt from the deposition of class representative Barbara Orr contained in the record on appeal records her understanding of the term "discharge" as follows: "I take that as meaning that you no longer work for the same employer, not that you don't have a job." This is directly contrary to the Petitioners' characterization of her testimony.

On page 9 of the Petition it is stated that no evidence was presented by either party to establish that the term "staffer" was imbued with special meaning within the Times' organization. In fact the record before the Circuit Court contained a joint affidavit of the class representatives containing numerous exhibits demonstrating exactly that fact. This affidavit was not countered by the Petitioners.

And perhaps most importantly, the Petitioners misstate the law on pages 21-22 of their Petition by contending that ERISA expressly defines severance benefits only in terms of unemployment benefits under 29 U.S.C. § 1002(1)(A). Contrary to the Petitioners' contention, severance plans are not incorporated within the definition of

"employee welfare benefit plan" through subsection (A) of 29 U.S.C. § 1002(1), which uses the word "unemployment." Rather, severance plans are incorporated into the definition of "employee welfare benefit plan" through 29 U.S.C. § 1002(1)(B) which incorporates by reference "any benefit described in section 302(c) of the Labor Management Relations Act, 1947." Those benefits incorporated in ERISA by reference to the Labor Management Relations Act include "holiday, severance, or similar benefits." 29 U.S.C. § 186(c)(6). "Thus, the effect of section 3(1)(B) of the Act [29 U.S.C. § 1002(1)(B)] is to include within the definition of 'welfare plan' those plans that provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized.)" 29 C.F.R. § 2510.3-1(a)(3) (1989). Thus the concept of unemployment is completely divorced from the concept of severance pay under ERISA's definition of an employee welfare benefit plan. Yet it is precisely this notion of unemployment as a condition of severance pay that has provoked each appeal in this case.

II. REASONS FOR DENYING THE PETITION

A. NO CONFLICT AMONG THE CIRCUITS

Entitlement to severance pay upon the sale of an ongoing business is an often litigated issue. The result of each case is dictated by the specific language of the applicable severance policy. Naturally, under some policies the employers have prevailed; under others the employees have prevailed. Petitioners assert that this

dichotomy of results evidences a conflict among the federal circuits. The Petitioners' consequent plea for this Court's discretionary review should be denied for three reasons.

First, there can be no such conflict in this context because each case is, in a sense, limited to its facts, or at least to the terms of its applicable severance policy. Indeed, the Circuit Court limited this case to its facts. "Under the particular terms of the Times' and MGA's severance benefits policy, as applied to the specific facts before us, we find that plaintiffs are entitled to severance pay." (Petitioners' Appendix at page 15).

Second, the "conflicting" cases cited by the Petitioners are readily reconciled and distinguished by reference to the operative language of the various severance policies being interpreted.

And third, even if there is a conflict, this Court's review of the unique severance policy applicable to this case would do little to resolve conflicts with the variant policies that will arise in other cases.

In the sale of an ongoing business, the employment relationship with the seller is clearly terminated although the employees suffer no unemployment. Thus, entitlement to severance pay usually turns on whether the policy contemplates unemployment as a condition of severance pay.

The severance policy applicable in this case was rendered twice: once in the *Times-O-Guide* and once in the *Staffer Handbook*. The *Staffer Handbook* provided that any

conflicts would be controlled by the *Times-O-Guide*. The *Times-O-Guide* contains the following policy:

> TERMINATION
>
> Our hope is that every staffer who joins the company will stay until retirement. However, we realize this is unrealistic and there will be turnover. Such separations, whether through resignation or discharge are simpler when certain ground rules are stated and understood.
>
> 1. When you resign, you should give notice. Two weeks is customary.
>
> 2. If, after the first six months, you are discharged as a full-time staffer for reasons other than cause (see examples below), the company will pay you 1 week's pay-in-lieu of notice for each 6 months of service. This amounts to 2 weeks' pay for 1 year of service, 10 weeks' pay for 5 years of service, etc. No pay-in-lieu of notice is paid for less than six months' service, nor for fractional parts of six-month periods.

(The "examples" parenthetically referenced deal with employee misconduct constituting "cause" for dismissal, and are not relevant here).

The *Staffer Handbook* paraphrased the policy as follows:

> *IN-LIEU PAY*
>
> If terminated without cause, a staffer is entitled to one week's pay for each complete six month period of employment upon termination. Termination with cause is defined in the *Times-O-Guide*.

The operative language in the *Times-O-Guide* is "discharged as a full-time staffer." In the *Staffer Handbook* it is simply "terminated." The policy does not reveal what the underlying motivation or purpose for the policy was, and courts should resist the temptation to speculate or substitute their own opinion regarding the general nature of severance pay. Yet the District Court concluded that the "language clearly lends a reader to the conclusion that an employee would be unemployed after the 'separation' no matter how short the term of unemployment." (Petitioners' Appendix at pages 27-28). The Circuit Court reversed, noting that "the severance pay policy at issue here does not define 'discharge' or 'termination' to require unemployment." (Petitioners' Appendix at page 13). It was obvious to the Circuit Court that the employment relationship, embodied in the term "staffers", was all that needed to be terminated under this particular severance pay policy.

By contrast, the cases cited by the Petitioners as conflicting with this case turn on different policy language contemplating unemployment as a condition of severance pay entitlement. In addition, many were decided under the arbitrary and capricious standard, which afforded deference to the employers' interpretations not appropriate under the *de novo* standard applicable in this case.

The terms "laid off," "lack of work," and the like are usually interpreted as requiring unemployment. For example, in *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985), the court, applying the arbitrary and capricious standard, was construing policy language describing termination as a "lay off" and "lack of work situation." *Id.* at 712. The court noted that "the lay off provisions of the

plan appear to contemplate a situation where the employees are without further employment for at least some period of time subsequent to the lay-off." *Id.* at 713. In *Bradwell v. GAF Corporation*, 954 F.2d 798 (2nd Cir. 1992) the operative language was "laid off because of lack of work." *Id.* at 799. In *Fuller v. FMC Corp.*, 4 F.3d 255 (4th Cir. 1993) the operative language was "laid off employees and terminated employees (employees laid off due to a closing of a plant or location)." *Id.* at 257. In *Schroeder v. Phillips Petroleum Company*, 17 F.3d 1147 (8th Cir. 1994) the operative language was "laid off due to a force reduction for lack of work." *Id.* at 1148. In *Headrick v. Rockwell International Corporation*, 24 F.3d 1272 (10th Cir. 1994) the operative language was "laid off for lack of work." *Id.* at 1276. In *Rowe v. Allied Chemical Hourly Employees Pension Plan*, 915 F.2d 266 (6th Cir. 1990) (a case not involving severance pay) the court held that the employees who were transferred to the purchaser were not "laid off" as that term was used in their pension policy. In *Harper v. R.H. Macy & Co., Inc.*, 920 F.2d 544 (8th Cir. 1990), the court construed a policy granting a "[s]everance [a]llowance . . . when [an employee is] permanently terminated or laid-off for periods that exceed 90 days." *Id.* at 545. The policy in *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541 (8th Cir. 1989), decided under the arbitrary and capricious standard, conditioned entitlement to severance pay upon termination "caused by lack of work."

The policy in this case does not utilize the terms "lay off", "lack of work", or the like.

In other cases, language in the policy such as "job elimination" or "position elimination" was interpreted by the court to contemplate unemployment. In *Sejman v.*

Warner-Lambert Co., Inc., 889 F.2d 1346 (4th Cir. 1989), the operative language of the policy was "terminated by the company as a result of job elimination." *Id.* at 1347. Likewise, under the arbitrary and capricious standard, where there was no period of unemployment, there was no "job elimination" as required under the plan in *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1149 (4th Cir. 1985). In *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983), the court interpreted policy language awarding severance pay "to cover separation caused by reduction in force of position elimination." *Id.* at 1212. Together with other policy provisions, the court held that under the arbitrary and capricious standard it was reasonable for the company to conclude that the policy anticipated a period of unemployment to award severance pay. In *Adcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623 (6th Cir. 1987), decided under the arbitrary and capricious standard, the policy awarded severance pay when a termination was "necessary to eliminate a position because of reduced workload or due to economic necessity." The policy's stated goal was to minimize "the economic and mental stress of terminated employees . . . between the release from Firestone and securing other employment." *Id.* at 624.

In this case severance pay is not predicated upon "job elimination" or "position elimination."

And finally, two other cases decided under the arbitrary and capricious standard are cited by the Petitioners, but are clearly distinguishable. In *Accardi v. Control Data Corp.*, 836 F.2d 126 (2nd Cir. 1987), the separation policy specifically defined three categories of separation, none of which included "the sale of a division where the

acquiring entity hires the division employees." *Id.* at 128. The court noted that under the arbitrary and capricious standard the separation policy was plausibly intended "as a discretionary unemployment benefit." *Id.* at 129. In *Schwartz v. Newsweek, Inc.*, 827 F.2d 879 (2nd Cir. 1987), decided under the arbitrary and capricious standard, the severance policy gave employees the option of transferring to the new company or searching for continued employment with the selling company. It further provided that if an employee did not wish to transfer and could not find suitable employment within the selling company, he would be entitled to severance pay. The court held that it was not arbitrary and capricious to deny severance pay to those individuals who voluntarily took employment with the purchaser. In the present case the employees were given no such option to refuse the transfer or be relocated within the Times organization.

Thus all of the Petitioners' cases can be distinguished and reconciled because the courts therein determined that policy language utilizing such terms as lay-off, lack of work, and job elimination contemplated unemployment as a condition of severance pay.

In some of the cases cited by the Petitioners, the courts indulged in speculation that severance plans are intended as unemployment benefits, and that to award severance pay when there was no unemployment would result in an unjust windfall to the employees. Such speculation is inappropriate under the *de novo* standard, and such conclusions would be wrong in this case. First, as already noted, under ERISA severance plans are not merely a species of unemployment plans. In addition, many courts have noted that while severance plans can

be intended as supplemental unemployment benefits, they can also be a reward for past services. See, e.g., *Alley v. Resolution Trust Corp.*, 984 F.2d 1201, 1205 (D.C. Cir. 1993). In any event, if, as here, the plan language does not disclose the employer's position regarding the nature of severance pay, but the plan is nevertheless unambiguous, the court is simply required to enforce the policy according to its terms. Second, although often cited, what happens to the employees after the transfer of employment is not technically relevant unless made so by the plan terms. But where, as here, the employees have indeed suffered a loss of benefits, the courts have not considered severance pay to be an unjust windfall. (Petitioners' Appendix at pages 8-9).

The severance policy in this case contains no language by which unemployment can be fairly implied as a condition of severance pay. Rather it is evident in the preamble of the TERMINATION policy and through the term "staffer" that entitlement to severance pay was predicated upon the mere termination of the employer/employee relationship without regard to unemployment. There is no conflict between this case and the others cited by Petitioners. Furthermore, because each case turns on the particular severance policy involved, no perceived conflict among the circuits can possibly be resolved by this Court's interpretation of a single severance pay policy dramatically different from the policies interpreted in the allegedly conflicting cases. The petition for certiorari should be denied.

B. CONFLICT WITH *FIRESTONE v. BRUCH*.

The parties concur that under *Firestone Tire And Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), extrinsic evidence is irrelevant if the operative language of the severance policy is unambiguous. The Petitioners, for the first time in this action, argue that the plan terms are ambiguous and thus require resort to extrinsic evidence. Until now both parties have strenuously contended that the plan terms are unambiguous. At the same time, respective counsel have zealously advocated contrary interpretations favorable to their respective clients. Opposing parties in any dispute involving the construction of a written instrument will advocate contrary interpretations. That does not *ipso facto* create an ambiguity necessitating the resort to extrinsic evidence. To hold otherwise would eviscerate the parol evidence rule, a result surely not intended by this Court in *Bruch*. The tack taken by the Petitioners is also a transparent attempt to bring factors relevant only under an arbitrary and capricious analysis into the *de novo* analysis mandated by *Bruch*.

The terms of the severance policy in this case are not internally inconsistent or otherwise ambiguous, and no resort to extrinsic evidence is necessary to discern the objective intent of the policy. The policy intended to grant severance pay to any staffer who was terminated without cause. No further inquiry into the subjective intent behind the policy is necessary or appropriate.

The Petitioners make much of the Circuit Court's refusal to seriously consider their extrinsic evidence of a "half-century of consistent interpretation and application

of the severance policy." This extrinsic evidence consists of a series of affidavits by present and former employees of the Times, all included in the record on appeal. This "half-century of consistent interpretation" amounts to a single instance in 1956 in which the Times sold the assets of its wholly owned subsidiary, Pinellas Broadcasting Company, and did not pay severance pay. No one asked for it. The severance policy was not even the same. The other three instances offered by Petitioners' extrinsic evidence are clearly distinguishable as mere corporate reorganizations in which the affected employees remained "staffers" somewhere within the Times organization or its affiliates. Such "uncontested proof" can hardly be characterized as compelling, even if considered. Convenient recollections of the original motivation behind the policy and distant examples of how the policy was applied, events that predated ERISA by almost 20 years and the sale of Modern Graphic Arts by 30 years, should not influence a court's *de novo* review of a policy in effect and applied to these employees in 1989.

The Circuit Court carefully and properly followed this Court's mandate in *Bruch*, and there is no conflict between the Circuit Court and this Court justifying intervention. Again, the Petition for Certiorari should be denied.

CONCLUSION

For the reasons stated above, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION

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PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION

Petitioners submit this Response to the Brief in Opposition filed by Respondents. Because the Brief in Opposition contains several misstatements, Petitioners are compelled to correct the record.

Refutation Of Respondents' "Fact" Allegations

Respondents wrongfully accuse the Petitioners of "several misstatements of the facts and the law". Respondents' Brief, p. 1. Petitioners first refute each and every alleged "misstatement of fact" or "law". Petitioners demonstrate that Respondents have plainly and self-servedly misrepresented the facts of record in an effort to avoid this Court's review.

Respondents first challenge the Petitioners' statement that the benefit package provided by successor MGA ownership was virtually the same as the benefit package provided by MGA. First, there was nothing at all erroneous or misleading about the Petitioners' statement. Contrary to Respondent's suggestion, Petitioners never said that each and every benefit was "identical". Rather, Petitioners correctly pointed to the undisputed record fact that the "overall level of benefits" was virtually the same because:

> the value of the Plaintiffs' total benefit package did not diminish as a result of the asset sale . . .
>
> The record fact is that a benefit package of comparable value, though not identical benefits, was provided.

Pet. p. 5 n.2.

Not only is Petitioners' fact statement regarding a fully comparable benefit package fair and accurate, Respondents' opinion that "the purchasing corporation did not have the same level of benefits" is nothing more than self-serving, partisan argument.

Respondents do not redeem their fact misrepresentation by citing the Circuit Court's observation that years of service were not carried over by successor ownership. In fact, Petitioners strenuously argue that the Circuit Court plainly erred in finding ERISA benefit entitlement based upon the terms of the successor owner's benefits package. The indisputable, uncontroverted record fact is that the Petitioners' severance plans do not in any manner hinge entitlement on whether a successor owner maintains the same level of severance benefits. And, severance pay is unvested and contingent; there is no future right to severance pay. Petitioners urge that the Circuit Court erred by scrutinizing the successor ownership's severance plan as a basis to find entitlement under the

Petitioners' programs. The successor owner's benefits are not a term of Petitioners' plan; entitlement under Respondents' plan cannot be fixed by resorting to this "evidence".

Next, Respondents argue that the Plaintiffs "never conceded" that the term "discharge" did not apply to their employment situation during the ownership change. Respondents' contention is the misrepresentation. The plain record fact, of which Respondents are fully aware, is that each Plaintiff testified that, in their opinion, the term "discharge" does not apply where the job continues.

Specifically, Plaintiff Bedinghaus testified that the term "discharge" means actual loss of the job:

> Q. And didn't you indicate to me earlier that the term "discharge" . . . means to you [that] you're out of a job?
>
> A. Yeah. If you took it in that term and you just said you were discharged, that would mean that you would be without a job . . . .

Bedinghaus Depo. pp. 96-97, 98.

According to Mr. Bedinghaus, the term "discharge" simply did not apply to the situation where employees continue at the same job, at the same location, under the same name, serving the same customers. Id. In

the context of the MGA sale, the statement that "Bill Bedinghaus was discharged from MGA" was incorrect and misleading:

> [I]f you read in the paper [that I was discharged from MGA] . . . you might assume that [I was] no longer working in the capacity that [I] was working before. . . . [That statement] would have been lacking information for someone to hear it that way . . . it would look like that I was not working at all for MGA or a company called MGA.

Bedinghaus Depo. pp. 86, 89.

Plaintiff Bacon also confirmed that the term "discharge" never applied to MGA employees:

> "Discharge" is a term I wouldn't use, I don't use in talking about the change of this company. . . . Discharge I would say was inappropriate.

Bacon Depo. p. 96 (emphasis added).

And, although Plaintiff Orr later attempted to avoid her admission, she agreed the term "discharge" does not apply where a employee remains in the same job, with the same duties, at the same location, for the same wage. Orr Depo. pp. 67, 68.

Thus, although their legal argument is that "discharge" occurs when assets are sold but jobs continue, Respondents fully acknowledged that, in the real world, the term "discharge" means something far different;

it means just what Mr. Bedinghaus described: "you would be without a job". There was no misrepresentation of any fact by Petitioners.

Next, Respondents claim that Petitioners misstated that there was no evidence to support the Circuit Court's extraordinary finding that the use of the word "staffer" rather than the synonymous term "employee", created a plain and unambiguous commitment that the business would be owned by Petitioners or severance would be paid. The Petitioners fully stand by their position; the Petitioners vigorously refute Respondents' suggestion that self-serving opinions set forth in the Respondents' partisan affidavits contain "evidence" of any "fact" to sustain the Circuit Court's findings. The Petitioners stand by their position that Respondents' partisan opinion is not "evidence" under the Federal Rules.

Finally, and "most importantly", Petitioners allegedly "misstate the law" concerning ERISA's definition of severance benefits in terms of "unemployment". Respondents' argument aside, the ERISA fact which was fully noted by Justice Ginsburg writing for the D.C. Circuit in Abbey v. Resolution Trust Corp., 984 F.2d 1201, 1205 (D.C. Cir. 1993), is that the definition of an ERISA "welfare benefit plan" specifically contemplates benefits in the event of unemployment. Justice Ginsburg correctly

recognized the relationship between severance pay and job loss. Retired Justice White also recognized the fact that severance is intended to buffer temporary unemployment. Headrick v. Rockwell Int'l Corp., 24 F.3d 1272, 1276-77 (10th Cir. 1994) (White, Associate Justice (Ret.)). Unemployment is clearly not, as Respondents state, "completely divorced from the concept of severance pay." Respondents' Brief, p. 3. Severance pay with continued employment is a windfall, a "happy period of double income." Headrick, supra, 24 F.3d at 1277. Petitioners' reliance on and agreement with Justice Ginsburg and Retired Justice White is hardly "misstating the law", as Respondents urge.

LEGAL ARGUMENT

Respondents Misstate And Oversimplify The Substantial Circuit Split On This Critical ERISA Entitlement Question.

Petitioners have alerted the Court to the deep and irreconcilable circuit split on the question of severance pay without job loss. In an effort to avoid this Court's review, Respondents mischaracterize the circuit split, and refuse to acknowledge the future effect of the Eleventh Circuit's decision granting severance entitlement without job loss.

Respondents attempt to dismiss the circuit split on the proposition that each case turns on the specific language of the particular plan and

therefore no particular precedent is ever set. Respondents fail to comprehend that all plans utilize slightly different verbiage. Respondents' sophistic approach does not square with reality. In the final analysis, a court's ruling on any ERISA entitlement issue is "limited" to the specific terms of the particular plan specifically before it which frame the issue. This obviously does not preclude a legal question from having implications and effects which transcend the particular "facts" of the underlying case.

The fact, which Respondents' rhetoric cannot change, is that the question of severance benefit entitlement on ownership change has yielded inconsistent results throughout the circuits.

The following Table pointedly demonstrates the circuit split: in the Second, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits, severance pay conditioned on job loss is not due where employment continues without interruption. The cases that award severance without loss of the job contain an unambiguous plan promise of a continued employment relationship with a particular company. Only in the Eleventh Circuit can employees be protected against job loss and receive severance pay, despite no promise of a continued employment relationship. The Eleventh Circuit awards severance pay where there is no "termination" or "dismissal"; in

fact, due solely to the Company's efforts, no jobs were lost and Plaintiffs' employment continued uninterrupted.

Circuit	Case Name[1]	Operative Plan Language	Employment Prerequisite	Severance Pay?
First	*Bellino*[2]	"termination...for lack of work"	job loss	Yes
	Allen	"involuntary termination by reduction in force	job loss	No
Second	*Accardi*	"mutually agreed resignation" or "dismissal"	job loss	No
	Schwartz	"dismissed"	job loss	No
	Bradwell	"permanently laid off"	job loss	No
Third	*Ulmer*	"Company will secure employment elsewhere and make severance payment"	separation from co.	Yes
Fourth	*Holland*	"job termination"	job loss	No
	Sejman	"terminated"..."job elimination"	job loss	No
	Fuller	"laid off...or terminated ...due to closing of plant"	job loss	No

[1] The full name and citation to each of these cases, previously cited in the Petition, are contained in the endnote to this Brief.

[2] Bellino is of dubious precedential value, in light of the First Circuit's later decision in Allen v. Adage, 967 F.2d 695, 701 (1st Cir. 1992).

Circuit	Case Name	Operative Plan Language	Employment Prerequisite	Severance Pay?
Sixth	*Adcock*	"eliminat[ion of] position"	job loss	No
Seventh	*Sly*	"involuntarily terminated"	job loss	No
Eighth	*Lakey*	termination "due to a period of unemployment"	job loss	No
	Harper	"permanently terminated or laid off"	job loss	No
	Schroeder	"laid off due to...lack of work"	job loss	No
Ninth	*Blau*	"alternative employment opportunities unavailable within the corporation"	separation from co.	Yes
	Jung	"involuntary termination"	job loss	No
Tenth	*Headrick*	"laid off for lack of work"	job loss	No
Eleventh	*Anderson*	"Company terminates employer-employee relationship"	separation from co.	Yes
	Harris	"involuntary termination... [and no] new assignment [within the company]"	separation from co.	Yes
	Bedinghaus	"termination"/"discharge as a full-time staffer"	job loss	Yes

The indisputable fact is that whatever the wording of the plan, the concept is precisely the same: courts outside the Eleventh Circuit will not find severance entitlement where no job is lost. Whether couched as "termination", "discharge", "lay off", "position elimination", or "lack of work", the fact is that in the numerous circuits cited above by Petitioners, ERISA severance is not triggered by an ownership change with uninterrupted employment (absent an express promise to that effect in the plan).

The language of Petitioners' plans also condition benefit entitlement in terms of loss of the job; "termination" and "discharge". These terms are the functional equivalent to other job loss language in plans, such as, "layoff", "position elimination", and "lack of work." Whatever the term, the effect on employees is the severance prerequisite; where no job is lost, no severance is due. The Eleventh Circuit has

ignored this ERISA fundamental, in conflict with the other circuits cited above.[3]

The Plaintiffs and the Eleventh Circuit have turned the "primary intention" of severance pay "on its head". Headrick v. Rockwell Int'l Corp., 24 F.3d 1272, 1276 (10th Cir. 1994) (White, Associate Justice (Ret.)). The Eleventh Circuit has created severance entitlement on nothing more than a restructure of the employer-employee relationship, without loss of the job. In the Eleventh Circuit, a severance plan requirement of "termination" and "discharge" has been construed to describe an ownership change while the job continues uninterrupted. Employees in the Eleventh Circuit who are transferred to a new owner receive the "happy period of double income" that was never contemplated by the plain ordinary meaning of plan terms. Headrick v. Rockwell Int'l Corp., supra, 24 F.3d at 1276-77.

Respondents further continue to mischaracterize the concept of "unemployment" in the case law, arguing that entitlement turns on whether

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[3] In Bedinghaus, the Eleventh Circuit even went beyond the special protections found in the Anderson and Harris plans, which condition severance on separation from the company rather than loss of the job. In Bedinghaus, no such special protection existed; job loss was the severance prerequisite.

the severance policy "contemplates unemployment as a condition of severance pay". Respondents' Brief, p. 4. Petitioners are aware of no case, and Respondents have cited none, which conditioned severance benefits on actual unemployment; i.e., the employee is no longer working at any job after termination. Rather, the case law confirms that severance benefits are intended to buffer the employee against job loss -- whether or not the employee has secured another job before experiencing actual unemployment.

In this case, of course, there was no job loss; there was never a threat of unemployment. The record is undisputed that the Times ensured there would be no job loss to the MGA staff in the ownership change. The Plaintiffs continued in the same jobs they held prior to the sale. The ownership change never resulted in any job loss, much less a period of actual unemployment.

Respondents charge that Justice Ginsburg and Retired Justice White have "indulged in speculation" that severance plans are intended to buffer employees from the economic consequences of job loss. Respondents' Brief, p. 9. Petitioners submit that Justice Ginsburg and Retired Justice White have correctly identified the primary purpose of ERISA severance

pay.[4] Headrick v. Rockwell Int'l. Corp., 24 F.3d 1272, 1276-77 (10th Cir. 1994) (White, Associate Justice (Ret.)); Abbey v. Resolution Trust Corp., 984 F.2d 1201, 1205 (D.C. Cir. 1993) (Ginsburg, J.). Severance pay is a voluntary employee benefit provided by employers, generally available to employees who lose their jobs through no fault of their own.[5] Any ERISA severance entitlement case must be viewed through this prism.

Contrary to Respondents' admonition that an examination of the purpose of ERISA severance benefits is "inappropriate speculation", Petitioners submit that ERISA entitlement questions cannot be determined without reference to ERISA and the purpose of severance pay. This Court's review is necessary to confirm the purpose of ERISA severance entitlement.

The Conflict With This Court's Holding In *Bruch* Is Very Real.

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[4] While some severance plans also reward past service, this concept is embodied in the amount of severance provided (e.g., one week severance for each year of service). The amount of severance due is entirely different from the threshold question of entitlement. If severance plans were only intended to reward past service, entitlement would include voluntary resignations and terminations for cause.

[5] Black's Law Dictionary (5th ed.) defines severance pay as: "[p]ayment by an employer to an employee beyond his wages on termination of his employment. Generally, it is paid when the termination is not due to employee's fault..."

Respondents advise this Court that Petitioners have raised the ambiguity argument "for the first time in this action." Respondents' Brief, p. 11. Nothing could be further from the truth. In fact, Petitioners argued to both the district court and the Eleventh Circuit that although they believed the plan to unambiguously condition severance pay on job loss, if the court found both Petitioners and Respondents made reasonable interpretations of plan language, then the plan language was ambiguous and evidence of drafter intent and past practice must be considered. Here, Petitioners' evidence of drafter intent and past practice was overwhelming and uncontradicted. There was no severance entitlement when no job was lost.

The district court found the plan terms unambiguously described job loss and held that no benefits were due. The Eleventh Circuit viewed the same language and concluded that plan terms unambiguously rendered job loss irrelevant and held that severance payment was due. The parties stipulated to the Eleventh Circuit that each side believed the plan to be unambiguous in their favor. The facts pointedly demonstrate that the plan terms could be deemed ambiguous, i.e., capable of more than one

reasonable meaning.[6] The possibility of an ambiguity is further buttressed by the fact that the circuit courts are split on the question of whether an ownership change, whether by sale, corporate restructure, spin-off or the like, triggers severance entitlement.

Petitioners suggest that the Eleventh Circuit erred by finding that the plan unambiguously required severance to be paid, and by not finding at the very least that an ambiguity existed. Petitioners argue that the Eleventh Circuit general approach in construing severance plan terms to trigger benefits without regard to job loss, is in conflict with the letter and spirit of this Court's Bruch analysis.

This Court is not the forum for the parties to advocate the relative strength of the extrinsic evidence that supported Petitioners' position on this benefits entitlement issue. Petitioners decline to be drawn into Respondents' debate. On this Petition, the relevant inquiry is whether the Eleventh Circuit disregarded Bruch by refusing even to consider the possibility and effect of ambiguity; and the evidentiary analysis concerning

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[6] Respondents argue that, if Petitioners' argument is accepted, the fact that advocates urge contrary positions will ipso facto create an ambiguity. This is not true; an ambiguity requires two or more reasonable interpretations.

intent and past practice which, under Bruch, must be scrutinized in resolving ambiguous plan terms. The Eleventh Circuit's result-oriented conclusion that the plan required payment of severance benefits without job loss, falls far short of the Bruch analytical framework. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

This Court's review is required to resolve the Circuit Court's failure to apply the directives of Bruch.

This Petition Presents An Important Issue Of National Concern:The Circuit Split Will Continue Until This Court Rules.

As detailed in the Petition, the question of ERISA severance entitlement in the event of ownership change has produced a sharp and irreconcilable split in the circuits throughout the country. The opposite reasoning and diametrically opposed ERISA entitlement results will not be resolved until the Supreme Court provides guidance on this important and recurring question.

The propriety of review in this case is demonstrated by this Court's recent grant of certiorari to three related Second Circuit cases involving the question of ERISA pre-emption of New York laws relating

to certain hospital rates and surcharges. New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., No. 93-1408; Cuomo v. Travelers Ins., Co., No. 93-1414; Hospital Ass'n of New York State v. Travelers Ins. Co., No. 93-1415. Petitioners urge that review of this recurring ERISA severance benefit question is just as important and appropriate.

Specifically, like the Second Circuit cases, this case involves: (1) an ERISA question that is national in scope and implication; (2) a clear-cut conflict between the circuits; and (3) a conflict with prior ERISA decisions of this Court. Like the Second Circuit cases, review of this decision will provide ERISA guidance to courts throughout the country as they struggle to give ERISA the consistency in application contemplated by Congress and enforced by this Court. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10, 107 S.Ct. 2211, 96 L.Ed.2d 1, 10 (1987), citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981); Ingersoll-Rand v. McClendon, 498 U.S. 133, 142, 111 S. Ct. 478, 484, 112 L.Ed.2d 474 (1990).

Until this split is resolved, employers in the Eleventh Circuit will continue to be liable for severance payments in the sale of a business, with

no job loss or interruption. Employers in the Second, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits face no similar liability. Eleventh Circuit employees will have unique ERISA rights to a period of double income. Employees in the Second, Fourth, Sixth, Seventh, Eighth and Tenth Circuits are entitled to no similar windfall.

ERISA severance entitlement cannot properly continue to turn on the geographic location of the participant. The proposition defies the requirement of uniform benefit entitlement standards. Id. The Eleventh Circuit result-oriented entitlement approach defies ERISA's objective of fostering the economic viability and continued existence of voluntary employee benefits. Businesses will be less willing to locate or open facilities in Georgia, Florida, or Alabama, where they will face an unintended severance liability on a sale. And, selling employers in these states now have no incentive to negotiate with a buyer for the continued employment of its staff. In the Eleventh Circuit, severance will be due even where ownership ensured that employees would have the advantage of continued, uninterrupted employment on equivalent terms. In the Eleventh Circuit, employers now have a strong incentive to discontinue severance benefits in their entirety.

Neither Congress nor this Court permits a patchwork of ERISA rights and remedies in the severance pay arena. This Court's review is needed to restore uniformity to ERISA standards governing severance entitlement.

Respectfully submitted,

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ENDNOTE

Bellino v. Schlumberger Tech., Inc., 944 F.2d 26 (1st Cir. 1991); Allen v. Adage, 967 F.2d 695, 701 (1st Cir. 1992); Bradwell v. GAF Corp., 954 F.2d 798 (2d Cir. 1992); Schwartz v. Newsweek, Inc., 827 F.2d 879 (2d Cir. 1987); Accardi v. Control Data Corp., 836 F.2d 126 (2d Cir. 1987); Ulmer v. Harsco Corp., 884 F.2d 98 (3d Cir. 1989); Fuller v. FMC Corp., 4 F.3d 255 (4th Cir. 1993); Sejman v. Warner Lambert Co., Inc., 889 F.2d 1346 (4th Cir. 1989), cert denied; Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985); Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623 (6th Cir. 1987); Sly v. P.R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983); Schroeder v. Phillips Petroleum Co., 17 F.3d 1147 (8th Cir. Mar. 10, 1994); Harper v. R.H. Macy & Co., Inc., 920 F.2d 544 (8th Cir. 1990); Lakey v. Remington Arms Co., Inc., 874 F.2d 541 (8th Cir. 1989); Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985); Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984); Headrick v. Rockwell Int'l Corp., 24 F.3d 1272 (10th Cir. 1994) (White, Associate Justice (Ret.)); Anderson v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir. 1985); Harris v. Pullman Standard, Inc., 809 F.2d 1495 (11th Cir. 1987); Bedinghaus v. Modern Graphic Arts, 15 F.3d 1027 (11th Cir. 1994) (App. p. 1).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on the 25th day of October, 1994, caused three (3) copies of the foregoing PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION to be served upon the Respondent herein by mailing said copies via first class United States mail, postage prepaid, to the attorney of record at the following address:

Leonard R. Poe, Esquire
P.O. Box 5
Burnsville, North Carolina 28714

/s/ Joseph M. English
Joseph M. English